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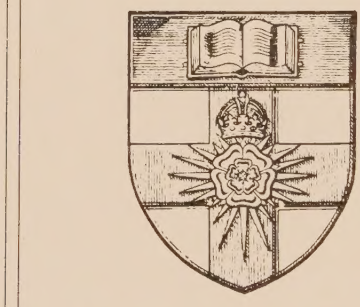

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1892.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR OF HOUSE OF LORDS REPORTS—A. P. STONE, *Barrister-at-Law.*

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1892. *May* 25. The Right Honourable Sir Charles Parker Butt, *President of the Probate, Divorce and Admiralty Division of the High Court of Justice, died at Wiesbaden, at the age of* 62.

June 2. Sir Francis Henry Jeune, *one of the Justices of the High Court of Justice, was appointed President of the Probate, Divorce and Admiralty Division in the place of* Sir Charles Parker Butt, *and* John Gorell Barnes, *Q.C., was appointed one of the Justices of the High Court of Justice.* Sir Francis Henry Jeune *was afterwards sworn of the Privy Council.*

In the Vacation, after Easter Sittings, The Right Honourable Sir Edward Fry *resigned his office as one of the Lords Justices of Appeal.*

July 5. Sir Archibald Levin Smith, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal in the place of* Sir Edward Fry [*having been previously sworn of the Privy Council*].

July 14. Gainsford Bruce, Esq., *Q.C., was appointed one of the Justices of the High Court of Justice in the place of* Sir Archibald Levin Smith.

Aug. 18. *The Great Seal was delivered to* The Right Honourable Farrer, Baron Herschell, *and he took the oath of office as Lord Chancellor of Great Britain.*

Aug. 20. Sir Charles Russell, Knt., *Q.C., was appointed Attorney-General in the place of* Sir Richard Everard Webster, *Q.C., and* John Rigby, Esq., *Q.C., was appointed Solicitor-General in the place of* Sir Edward George Clarke, *Q.C.*

ERRATUM.

Page 487, foot-note, *for* "1 App. Cas. 145" *read* "[1891] A. C. 145."

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UNIVERSITY OF LONDON
Burlington Gardens,
LONDON, W.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

JOHN CHARLES SALT AND SIR HENRY WHATLEY TYLER, Kt., M.P. . . . } APPELLANTS;

AND

THE MARQUESS OF NORTHAMPTON, K.G. . . . . } RESPONDENT.

H. L. (E.)
1891
Nov. 30.

Mortgage—Policy of Insurance—Construction of Contract—Right to Policy Money—Fetter on Redemption.

Trustees of an insurance society advanced £10,000 to C. on the security of a reversionary interest to which C. was entitled contingently on his surviving his father. As part of the loan transaction the trustees insured the life of C. against that of his father for £34,500 in the society of which they were trustees, and paid the premiums till C.'s death. C. executed a bond charging the reversion with principal, premiums, and interest on principal and premiums. By written agreements the interest and premiums were to accumulate at compound interest for five years. The agreements contained special clauses providing (inter alia) to whom the policy in certain specified events should belong, and declared that in the event of C. paying the whole sum due before the death of his father the trustees should be bound to assign the policy to C., and that if C. should predecease his father without having paid all principal moneys, interest, and costs the policy should belong absolutely to the trustees, they being bound in that event to impute to the debt all moneys they might receive in respect of the policy. C. died in his father's lifetime, having never paid anything:—

Held, Lord Hannen dissenting, that upon the true construction of the documents the contract was, not that the policy should be effected for the

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1891
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trustees' protection only and for their sole benefit, subject to an option for C. to make it his own in the event of his paying off the debt in his lifetime, but that the policy was mortgaged to the trustees and was the property of C. subject to the charge; therefore that in accordance with the equitable doctrine against fettering a mortgagor's right of redemption C.'s representatives were entitled to the policy moneys after deducting all sums due :—

Held, by Lord Hannen, that upon the true construction of the documents the transaction was not intended to be and was not a mortgage of the policy; that the policy never belonged to C., but in the event which happened belonged absolutely to the trustees, subject to the obligation to impute to the debt the moneys received.

The decision of the Court of Appeal (45 Ch. D. 190) affirmed.

APPEAL from a decision of the Court of Appeal reported as *Marquess of Northampton* v. *Pollock* (1).

The appeal arose in an action brought by the Marquess of Northampton as administrator of the late Earl Compton against Henry Pollock, J. C. Salt, and Sir H. W. Tyler, who were the Trustees of the National Life Assurance Society.

By a bond and disposition in security in Scotch form dated the 26th of May 1879 the late Earl Compton, being the heir of entail next entitled after the death of his father (the plaintiff) to certain real estates in Scotland, in consideration of the sum of £10,000 advanced to him by the defendants, bound himself, his heirs, executors, and representatives to pay the defendants that sum at Martinmas 1879 (with a fifth part more of liquidate penalty in case of failure) and interest on the said sum at 5½ per cent. per annum, and thereafter half yearly during the non-payment of the principal sum to pay interest at the rate aforesaid with the like liquidate penalty. He also bound himself, so long as the principal sum or any part thereof should remain unpaid, to pay the defendants the annual sum of £435 5*s*., being the premium of a policy of assurance effected by the defendants on his life as against that of his father in the National Life Assurance Society for £34,500; also that if he should at any time not pay one or more of the premiums it should be in the power of the defendants to pay such premiums themselves and to charge the amount so paid against him in like manner as the principal sum. And in security of the personal obligation therein written

(1) 45 Ch. D. 190.

he assigned his reversionary interest in the aforesaid real estates to the defendants in the manner therein mentioned reserving power of redemption.

The policy of insurance referred to in the bond had been effected on the 15th of May 1879 by the defendants with the National Life Assurance Society on the life of Earl Compton, the insurance to be payable only in the event of Earl Compton dying in the lifetime of his father.

By a minute of agreement of even date with the bond (26 May 1879) and made between the defendants, thereinafter called the first party, and Earl Compton, thereinafter called the second party, it was provided as follows:—

"Whereas the second party has at the date hereof received an advance from the first party of £10,000 sterling, in security of which the second party has of even date with the date of his signature hereto granted a bond and disposition in security in favour of the first party over the lands and estate of Kirkness, to which he is heir of entail next entitled to succeed after the said most noble marquess his father the heir of entail now in possession thereof: And whereas it has been agreed upon between the parties notwithstanding the terms of said bond and disposition in security and without prejudice thereto in any manner of way, that the terms on which said advance of £10,000 has been given shall be as hereinafter mentioned: therefore the parties hereto agree and bind and oblige themselves and their respective successors and representatives and heirs and executors in manner following:—

"First. The first party shall effect a policy or policies of assurance on the life of the second party as against that of the said most noble marquess his father to the extent of £34,500 with such assurance company or companies as they may select and that in such terms as to them shall be deemed advisable.

"Second. The interest payable on the said advance of £10,000 and the premiums payable on the said policy or policies of assurance shall be allowed to accumulate for a period of five years, that is to say the term of Whit Sunday 1884, and compound interest with half-yearly rests at the rate of 5½ per centum per annum shall be charged thereon.

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"Third. On the expiry of the said period of five years it shall be in the power of the first party, in the event of said advance of £10,000 premiums of assurance interest and others accumulated as aforesaid not having been paid to them by the second party, forthwith to exercise their full powers and privileges conferred on them hereunder or under said bond and disposition in security, and in the event of their not exercising their powers and privileges they may continue to pay said premiums and interest as before provided and the principal sum, premiums, interest and others may be allowed to accumulate as aforesaid, and that so long as the said first party may think proper to do so, and the first party shall be entitled to use all diligence against the person or estate of the second party for payment of the interest or premiums paid by them after the expiry of the period of said five years and that without prejudice to the powers and privileges in regard to any sum due by the second party before or otherwise: And it is hereby agreed between the parties that a statement under the hand of the first party or any person duly appointed by them for that purpose and certified by them or him as correct shall be sufficient and conclusive evidence of the amount due by the second party to the first party as at the date of said certified statement: and it is hereby provided that in making up said statement the first party shall be entitled to include therein all expenses incurred in connection with said advance and also interest at the rate of three per cent. on the amount repaid to them from the date of payment till the first term of Whit Sunday or Martinmas thereafter in the event of said amount being paid between terms.

"Fourth. In the event of the second party not having paid to the first party the whole sums due by him to them before the death of the said most noble marquess his father, then the policy or policies of assurance effected by the first party as aforesaid shall belong absolutely to the first party, and neither the second party nor his representatives shall have any claim or right thereunder in any manner of way, and the first party shall be entitled to exercise their full powers and privileges under said bond and disposition in security as if no such policies had been effected.

"Fifth. In the event of the second party paying the first party before the death of the most noble marquess his father the whole sums due to them the first party shall be bound forthwith to assign said policy or policies of assurance to the second party, but that always at his own expense.

"Sixth. In the event of the second party predeceasing the said most noble marquess his father, and without having paid the first party the whole sum due to them, the first party shall prepare a statement certified as aforesaid and made upon the principle before specified shewing the amount due as at the date of the death of the second party, and they shall be bound to impute to the amount as brought out in said statement the whole sums of money they may receive in respect of said policy or policies of assurance, and in the event of said sums so received exceeding the amount due under said statement to account for and pay over the difference or excess to the representatives of the second party entitled to receive the same, and in the event of the sums so received being inadequate to meet the amount brought out in said statement then the first party shall have full right to exercise the powers and privileges conferred on them under said bond and disposition in security to recover from the means and estate of the second party the balance due to them, after deducting all expenses and any excess interest which may be charged in respect of said sums not being paid to the first party until a certain time after proof of death of the second party and also of interest at the rate of three per cent. as provided in article three hereof in the event of said amount being paid between terms."

By a memorandum of agreement made the 14th of June 1879 between the same parties, after reciting that H. Pollock, J. C. Salt, and Sir H. W. Tyler, had agreed to lend to Earl Compton the sum of £10,000, and reciting the sixth clause of the agreement of 26th May, it was provided as follows :—

"And whereas such last-mentioned clause does not accurately state the terms upon which the said advance of £10,000 was agreed to be made, it having been agreed that the policy or policies to be effected upon the life of the said Earl Compton against that of his father the Marquess of Northampton and in

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the event of his death before his father without having repaid all the principal moneys, interest, and costs due to the said Henry Pollock, John Charles Salt, and Sir Henry Whatley Tyler, that the said policy or policies and the sums thereby assured should belong absolutely to the said Henry Pollock, John Charles Salt, and Sir Henry Whatley Tyler or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns: Now these presents witness that in consideration of the said advance being made to the said Earl Compton it is hereby agreed and declared by and between the said parties hereto, that in the event of the said Earl Compton predeceasing his father, the Marquess of Northampton, without having paid all principal moneys, interest, and costs due to the said Henry Pollock, John Charles Salt, and Sir Henry Whatley Tyler under or by virtue of the bond in the said recited agreement mentioned, that then and in such case the policy or policies and all moneys thereby secured shall belong absolutely to the said Henry Pollock, John Charles Salt, and Sir Henry Whatley Tyler or the survivors or survivor of them or the executors or administrators of such survivor or their or his assigns: And it is further agreed that in consideration of the premises the said Earl Compton shall, whenever called upon so to do, execute any further or other assurance for the purpose of carrying out at his own expense this agreement."

Earl Compton died in 1887 without ever paying anything.

The statement of claim referred to the above-mentioned documents and claimed (inter alia) a declaration that the defendants were entitled to the policy and the sums assured thereby as a security only for the £10,000 with interest and for the premiums with interest, and also claimed an account and inquiry and payment of the balance after deducting what should be found due.

The statement of defence contained (inter alia) the following allegations:—

1. "In the spring of 1879 a proposal was made for a loan by the defendants to Earl Compton of £10,000 upon the security of a charge on his interest in freehold property in Scotland of which he was tenant in tail in remainder expectant on the death

of the plaintiff, and they proposed that an insurance should be effected for £34,500 on his life against that of the plaintiff, and the defendants expressly stipulated that if Earl Compton should die in the lifetime of the plaintiff the policies should belong absolutely to them. Earl Compton consented to these terms, and the negotiations for a loan were continued entirely on this footing. Earl Compton had at the time the professional assistance of Messrs. Parker of Bedford Row and Mr. Francis Lamb also of Bedford Row. The proposal that if Earl Compton died in the lifetime of the plaintiff the policies should belong absolutely to the defendants was very fully discussed and considered between the Secretary of the National Life Assurance Society and Mr. Lamb and Mr. Frederick Searle Parker, and was expressed in writing and communicated to Mr. Lamb and Messrs. Parker as well as to Earl Compton in 1879, and they all thoroughly understood the matter and agreed to the terms proposed. There never was any other agreement for the loan by the defendants to Earl Compton, and the policies mentioned in the statement of claim were effected in order partly to carry out the arrangement above mentioned and not otherwise.

2. "The deed of 26th May 1879 was executed in order partly to carry out the arrangement above mentioned and was intended to carry out certain terms of the arrangement.

3. "The bond of 26th May 1879 and the minute of agreement of the same date were prepared by certain agents in Scotland of the defendants' solicitors and were intended to carry into effect the arrangement above mentioned, but these agents had, in fact, misapprehended the arrangement in regard to the policies. The minute of agreement was in fact executed by Earl Compton on the 26th May 1879, but before that document and the bond of even date were delivered to the defendants and before any part of the proposed loan had been paid the secretary of the National Life Assurance Society observed that the minute of agreement did not correctly express the arrangement as to the policies, and he directed that completion of the loan was to be deferred until the matter had been put upon a proper footing. Thereupon the defendants' solicitors saw both Mr. Lamb and Messrs. Parker on the subject, and as those gentlemen agreed

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with them as to the real arrangement in reference to the policies the agreement of 14th June 1879 mentioned in the statement of claim was prepared by the defendants' solicitors and submitted to Messrs. Parker and they as solicitors for Earl Compton agreed thereto. Earl Compton was not at that time in London, but Messrs. Parker undertook in writing with the defendants that if they would complete the loan to him they would within fourteen days obtain his signature to a copy of the agreement and in default would return the amount of the loan. Thereupon (that is on the 31st May 1879 after the execution of this undertaking) the defendants paid the sum of £10,000 to Messrs. Parker on behalf of Earl Compton, and he on the 14th June 1879 executed the agreement of that date, and Messrs. Parker thereupon handed the sum of £10,000 to him. Such agreement truly stated the real nature of the transaction. It was executed by Earl Compton under proper independent advice in full understanding of the contents and effects thereof, and except on the faith of this agreement no advance would have been made by the defendants to Earl Compton.

4. "Earl Compton never paid any interest on the loan or any premium on the policies. He allowed the defendants to pay all the premiums on the policies during his life, well knowing the agreement which had been made, and he never raised the slightest question as to the agreement of 14th June 1879, and even if he could have raised any question in regard thereto (which is not the fact) the plaintiff as his administrator is bound by the acquiescence of Earl Compton and by delay and laches."

The plaintiff having delivered a reply, it was ordered "that the following point of law raised by the amended reply be tried; that is to say, whether even admitting the allegations of fact contained in the defence to be true (reference being had to the several documents mentioned in the defence for their contents respectively) the agreement dated the 14th of June 1879 in the pleadings mentioned is not valid in law and does not bind the plaintiff, on the ground that it is an agreement limiting a mortgagor's right of redemption to his lifetime."

Upon the hearing (which the parties consented to treat as the

trial of the action) North J. made an order declaring that notwithstanding the provisions of the agreement of the 14th of June 1879 the plaintiff was entitled to the relief thereby granted; and directing:

1. An account of all moneys received by the defendants or by their order or for their use under or by virtue of the policy of assurance in the pleadings mentioned or which except for their wilful default might have been so received.

2. An account of what was due to the defendants for principal, premiums, interest, and costs (other than their costs of this action) under and by virtue of the bond and disposition of the 26th of May 1879 and minute of agreement of even date down to the date of the receipt by them of such policy moneys.

3. An inquiry (if necessary) what moneys would have been received by the defendants in the ordinary course under the policy if it had been effected in another society and at what date.

The order also directed that the amount which should appear due on taking the account No. 2 be deducted from what should appear to be due upon the account numbered 1 and that the balance be certified: And that the defendants J. C. Salt and Sir H. W. Tyler should within twenty-eight days of the filing of the Chief Clerk's certificate pay to the plaintiff the amount of such balance so certified, together with interest thereon at £4 per cent. per annum from the date at which the said policy moneys were received or were to be deemed to have been received by the defendants down to the date of payment.

That order was affirmed by the Court of Appeal (Cotton and Lindley L.JJ., Bowen L.J. dissenting) (1). The present appeal was brought by the surviving defendants, H. Pollock having died during the proceedings.

July 23, 24. Sir *Horace Davey* Q.C. and *Rigby* Q.C. (*E. Beaumont* with them) for the appellants:—

The question in dispute is not as to the equitable doctrines "once a mortgage always a mortgage" and that where there is a mortgage equity will not suffer any fetter on the right to redeem. That is good sense and good law. The question here is one not

(1) 45 Ch. D. 190.

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of law or equity but of fact; of construction of the documents: was there a mortgage of the policy? A man cannot mortgage that which is not his. Then was the policy the property of Lord Compton? That question can only be answered by reading all the documents together. The only property which he could mortgage was the Scotch realty, in which he had a reversionary interest contingent upon his surviving his father. The respondent begins at the wrong end, and calls the parties mortgagor and mortgagee, and then applies the equitable doctrines to the policy. But there is only one event in which the policy is to be the property of Lord Compton, and that event never happened. By clause 4 if the borrower does not pay the debt before the death of his father the policy shall belong absolutely to the lenders, and neither the borrower nor his representatives shall have any claim or right thereunder. The only event which gives an option to the borrower to become the owner of the policy is the event of his paying the whole debt before the death of his father. In that event the lenders are bound by the fifth clause to assign the policy to the borrower. As the borrower never exercised that option the policy never was assigned but remained the property of the lenders. The difficulty suggested, that if the appellants' construction is right the debt is not extinguished in the event which happened and they are entitled both to retain the policy moneys and to sue the borrower's representatives on the bond, has no real existence. The true construction of the 6th clause, as amended by the supplementary agreement of the 14th of June, is that the lenders are bound to impute to the amount due at the death of the borrower the sums receivable in respect of the policy. The debt is therefore extinguished. The rest of the 6th clause is superseded by the supplementary agreement. The respondent points to the fact that the borrower incurs a debt for the premiums and relies on authorities for the proposition that when a borrower pays or is bound to pay the premiums the policy is considered in equity to be his. That is only an inference which the Court draws where the matter has not been expressly provided for, as for instance in *Drysdale* v. *Piggott* (1), where it was conceded that the policy belonged to

(1) 8 D. M. & G. 546.

the debtor and the only question was whether by non-payment of the premiums he and his surety had abandoned the policy. But this inference may be rebutted by evidence shewing that the parties did not intend the policy to belong to the debtor. Here there is an express contract that it shall not be his and that he shall have no claim or right under it, except in a certain event, which did not happen. There is no authority that the parties may not so expressly contract; no rule in equity to the contrary. Equity may and does hold certain contracts to be invalid, but it does not alter the terms of a contract. There is nothing contrary to equity in such a bargain as was made here. It was a mere wager of one life against another. The policy (which no doubt is on the same footing as if it had been taken out with another insurance office) was a wagering policy. The contract represents simply the price which Lord Compton, having no security to offer except a contingent reversionary interest, had to pay for the loan. There is nothing (since the repeal of the usury laws) to prevent people contracting for a bonus, and where it is clear that the parties intended a bonus the presumption which equity makes in an ordinary case where there is no express contract is rebutted: *Potter* v. *Edwards* (1). Where there is no fraud or unfair dealing, but both parties "understand what they are about and know precisely what they are doing, and it is done voluntarily and in pursuance of a deliberate bargain" the contract will not be set aside: *Maitland* v. *Upjohn* (2). There is no principle of equity against people making a special bargain which is not a mortgage and has not the qualities of a mortgage, but is a conveyance subject to a limited right of redemption: *Goodman* v. *Grierson* (3).

In *Newcomb* v. *Bonham* (4) lands were conveyed, to be redeemable upon payment of £1000 and interest at any time during the life of the grantor, with a covenant by the grantor that in case the lands should not be redeemed in his lifetime they should never be redeemed. The grantor having died without redeeming, his heir-at-law exhibited a bill to have redemption. The Lord Chancellor (Lord Nottingham) held that on the principle of once

(1) 26 L. J. (Ch.) 468.
(2) 41 Ch. D. 126, 143, 144.
(3) 2 Ball. & B. 274.
(4) 1 Vern. 7, 214, 232; 2 Vent. 364.

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a mortgage always a mortgage the right of redemption continued and so decreed. But upon a demurrer to a bill of review to reverse that decree the Lord Keeper (Lord Guilford) held there was "no reason to raise an equity to take the estate from the mortgagee" and dismissed the original bill for a redemption. And this dismission was affirmed in the House of Lords. Looking at the present transaction as a whole this is not the case of a borrower mortgaging his own property and then consenting to fetter his own right to redeem, but the case of a loan protected in a particular event, not by a mortgage, but by a wagering and speculative bargain. The policy was not a security for Lord Compton's debt except in the sense that he might buy it, and the clauses which the respondent relies on as provisoes for redemption were provisoes for purchase.

Crackanthorpe Q.C. and *Reginald Winslow* for the respondent :—

The principle which governs this case is that contained in the expression "once a mortgage always a mortgage." Equity will not suffer a fetter upon the right of redemption; if (as the fact was) Lord Compton had a right to redeem the policy during his life it must be redeemable after his death. That there was a mortgage of the policy is apparent from the bond, the policy, and the agreement, all being read together and looked at as one transaction. When a creditor takes out a policy on the debtor's life and the debtor pays or is bound to pay the premiums, the policy is the property of the debtor, subject to the creditor's security, and the debtor or his representatives is entitled to the policy if the debt is paid: *Holland* v. *Smith* (1); *Drysdale* v. *Piggott* (2); *Morland* v. *Isaac* (3); *Courtenay* v. *Wright* (4); *Bruce* v. *Garden* (5). The policy was not (as Bowen L.J. held) a wager policy; it was a form of time policy on joint lives. The bond recites the policy and binds the debtor to pay the premiums, and the debtor expressly reserves his right of redemption. The language of the agreement is not consistent with the contention that the policy was the property of the creditors. By the second clause

(1) 6 Esp. 11.
(2) 8 D. M. & G. 546.
(3) 20 Beav. 389, 392.
(4) 2 Giff. 337, 351.
(5) Law Rep. 5 Ch. 32.

compound interest is payable on the premiums which were to accumulate for five years. By the fourth clause if the debtor does not pay the whole debt before his father's death the policy "shall belong absolutely" to the creditors. The words "shall belong absolutely" in a certain event express the future tense and cannot mean "shall continue to belong." They contemplate a change of ownership. Different words would have been used if the policy was meant to belong to the creditors from the first. The language of the fifth clause is that of a redemption clause: not the language of a purchase. The sixth clause makes it quite clear that the creditors were not the absolute owners of the policy, for in the event of the debtor dying before his father without having paid the whole debt the creditors are bound to impute to the amount due the sums received under the policy and if those sums exceed the debt to pay over the excess to the debtor's representatives. The supplementary agreement of the 14th of June alters that clause, whether partially or entirely makes no difference to the respondent's contention. If it abrogates the sixth clause altogether then the creditors are not bound to impute the policy moneys to the debt, but—if, as they were at liberty to do, they insured in another office—they might both receive those moneys and sue the debtor's representatives for the debt; a result which could not possibly have been intended, and which the appellants are now eager to disclaim. If on the other hand the clause is not superseded but only varied the intention of a mortgage remains. If a mortgagee stipulates for a collateral advantage clogging the right of redemption with any by-agreement the stipulation is void: *James* v. *Kerr* (1). This principle was held not to be affected by the repeal of the usury laws: *Broad* v. *Selfe* (2); and see the cases cited in the notes to *Howard* v. *Harris* (3), in 2 Wh. & T. L. C. Eq., 6th Ed. p. 1184; Coote on Mortgages, 4th Ed. p. 26; *Field* v. *Hopkins* (4).

Sir *H. Davey* Q.C. in reply.

The House took time for consideration.

(1) 40 Ch. D. 449, 459.
(2) 11 W. R. 1036.
(3) 1 Vern. 33.
(4) 44 Ch. D. 524.

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My Lords, my opinion in this case has undergone some fluctuation, owing perhaps to the manner in which it was presented to your Lordships. Usually, in questions of this kind, there is some evidence of facts, in addition to what may be collected from the instruments executed to give effect to the contract between the parties. Here, your Lordships have nothing beyond those instruments themselves, and the pleading of the appellants in their "defence," which is to be taken as admitted, subject to such explanation or correction as it may receive from the documents.

The facts, that the policy of insurance was for more than three times the amount of the debt, and that no premiums were ever paid by the debtor (an event which was contemplated and provided for as probable), seemed to me for some time to have an aspect favourable to the appellants. They would, certainly, have been as consistent with an intention that the policy should be effected for the creditor's protection only, and for his sole benefit, subject to an option for the debtor to make it his own, in the event (not anticipated) of his paying off the debt in his lifetime, as with an intention that it should belong to the debtor, subject to the security for the purpose of which it was effected. The question is, which of these contracts is to be inferred from the terms of the instruments creating the security? In favour of the former, there is nothing else, except the statement in the "defence," and the stipulation itself, of which the validity or invalidity in point of law is now to be determined.

It was considered by all the judges in the Court below, and it was admitted (I think rightly) at your Lordships' bar, that the case must be decided in the same way as if the policy had been effected in any other office, and not (as it was) in the office of the creditors. The creditors might, and probably they did, reinsure in some other offices or office. And I think it is also immaterial for the purpose of the present question, that the debtor did not pay the premiums, or any of them, and that the probability of his failing to do so was provided for by the contract. He bound himself to do so; he was, as between himself and the appellants, chargeable with those premiums, which must,

for the present purpose, be treated as advanced to him by way of loan, just as much as the principal sum of £10,000. If, as things stand, the appellants are not mortgagees of the policy, and are not bound (the whole debt, interest, and premiums being satisfied out of its proceeds) to account for the surplus to the respondent, as the debtor's personal representative, their situation would have been the same if every single premium had been paid by the debtor in his lifetime.

If the policy, which was certainly effected for the purpose of being made (in some sense) a security to the appellants, belonged (subject to that security) to the debtor, and if the appellants ought to be regarded as mortgagees of that policy, it is admitted that a stipulation, that, in the event of the debtor dying without having paid off the debt, the policy should not be redeemable, would be void; and, upon the same supposition, it is not less clear that this is the character of the stipulation now in question. The only question is, whether the debtor was, in fact and in law, mortgagor of, and entitled to redeem this policy. This he could not be, unless he had an interest in it which he could and did make a security to the appellants.

If the question is to be determined by what appears upon the face of the bond and disposition in security of the 26th of May, the minute of agreement of the 26th and 28th of May, and the supplementary agreement of the 14th of June, 1879, taken all together, and read in the light of the appellants' acknowledgment at your Lordships' bar, that the supplementary agreement was not intended to make Lord Compton's representatives liable to be sued for the whole debt while the whole proceeds of the policy were retained by the appellants, I cannot escape from the conclusion that the parties did stand to each other, in respect of this policy, in the relation of mortgagor and mortgagee.

I am not prepared to hold that if it were made out that the policy was effected for the creditors' benefit, subject only to an option for the debtor to acquire a right to it by making a payment which he never made, the obligation of paying the premium, which the debtor certainly undertook, would have made it the property of the debtor, contrary to the contract. I see no principle on which I ought so to hold, since the repeal of the

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usury laws, and in the absence of any allegation or proof of fraud, oppression, or other unfair dealing. There was originally, in the respondent's pleading, an allegation of some unfair dealing; but at the trial it was abandoned, and it now stands formally dismissed.

But the authorities (*Holland* v. *Smith* (1); *Drysdale* v. *Piggott* (2); *Morland* v. *Isaac* (3); *Bruce* v. *Garden* (4)), certainly establish, that the primâ facie effect of an agreement between debtor and creditor, in a transaction such as the present, that the creditor shall effect a policy, and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor; the principle being, that what the debtor pays or agrees to pay for is (primâ facie, at all events) his, subject to the security for the purpose of which it was brought into existence. Those were, beyond controversy, terms of the agreement in the present case; and there is much besides in the documents to fortify the application of the principle.

Although nothing here turns, in the result, upon the difference between a policy effected in the appellants' own office and one effected elsewhere, it is difficult to see why the form of an insurance in the creditors' own office (especially when provision was made for a probable failure of the debtor to pay the premiums) should have been interposed between the contract with the debtor and that reinsurance which was the only real security to the creditors in the event insured against, if the debtor was not to have the ordinary interest of a mortgagor in the policy. The very first thing done was to effect that policy, some days before the date of the minute of agreement of the 26th and 28th of May, 1879. It was the only policy with which the debtor had anything to do; it fixed the amount of the premiums with which he was to be charged, and for that purpose made the sum insured more than three times the amount of the debt. Being effected by the creditor with his own trustees, it was an insurance in form only, and not in substance, if he alone was to be interested in it. All the documents shew that the debtor was to have some interest in it, greater or less; and, this being so, I cannot look upon the

(1) 6 Esp. 11.
(2) 8 D. M. & G. 546.
(3) 20 Beav. 389.
(4) Law Rep. 5 Ch. 32.

stipulation out of which the present question arises as enough by itself to shew that his interest was not that of a mortgagor, which everything else tends to shew it was.

The fourth clause of the minute of agreement (whatever difficulty there may be in its application to the events which might happen), certainly does not favour the idea that this policy was ab initio to belong to the creditor. It says, that it "*shall* belong to him absolutely," in an event which would not be determined during the currency of the policy. The word "absolutely" seems to imply that his interest in it, down to that time, was that of a secured redeemable creditor, and not absolute. The fifth clause does not say that a new interest in it is to accrue to the debtor if he pays off the debt; but that in that event the creditor shall be "forthwith bound to assign" the policy to him; as he would be bound to do if the debtor was already entitled to an equity of redemption subject to the creditor's security. And the sixth clause, by a provision which the supplementary agreement of the 14th of June was (it is admitted) not meant to evacuate, provides that, in the event of the moneys assured becoming payable, the creditors are to make out and certify the correctness of an account, shewing the amount due at the debtor's death; and "shall be bound to impute to the amount, as brought out in said statement, the whole sums of money they may receive in respect of said policy." That is an obligation which would not exist, as between the creditor and the debtor's representatives, if the debtor dying without having paid the debt had no interest in the policy. The clause, substituted for what next followed (on the footing of the rectification of an acknowledged error), by the supplementary agreement of the 14th of June, but not meant to supersede that obligation, deals only with the surplus, if any, which might remain after the debt was paid off.

Upon the face of these documents I have come to the conclusion that the case is against the appellants. And the statement in their "defence" does not appear to me to make any difference. That statement is manifestly inaccurate, and must be tested by the documents, not the documents by it. It says that, on the treaty for the loan, "the defendants expressly stipulated that if Earl Compton should die in the lifetime of the plaintiff" (his

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father) "the policies should belong absolutely to them. Earl Compton consented to these terms, and the negotiations for a loan were continued entirely on this footing. The proposal that, if Earl Compton died in the lifetime of the plaintiff, the policies should belong absolutely to the defendants, was very fully discussed and considered. There never was any other agreement for the loan by the defendants to Earl Compton; and the policies mentioned in the statement of claim were effected in order partly to carry out the arrangement above-mentioned, and not otherwise."

This is an allegation that, in the only event on which anything would be payable under any policy effected, the policy should belong absolutely to the creditors, without any exception of the case of the principal debt, interest, and premiums having been fully paid by Earl Compton in his lifetime, and without any obligation on the part of the creditors to impute to that debt the whole or any part of what they might receive. This is not consistent with the written instruments, in any view which can possibly be taken of them, and I cannot regard them as controlled by it.

I am unable to dissent from the view taken by North, J., and by the majority of the judges in the Court of Appeal; and I propose to move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD BRAMWELL:—

My Lords, the first thing I find it necessary to do in this case is to learn and familiarise myself with the law which governs it, and its language. Of course, one knows in a general, if not in a critical way, what is an equity of redemption. It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender, I suppose one may say by a debtor to a creditor, on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is now a legal right in the debtor. Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather

than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it.

But there is a further equitable rule which seems to be this: That this right of redemption shall not even by bargain between the creditor and debtor be made more burdensome to the debtor than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed may have occurred or arisen: That any agreement making such right of redemption more burdensome is void. For instance, £1000 out at 5 per cent. payable in six months on mortgage, with a proviso that if not paid in six months the right of redemption should not be exercised, except on payment of 6 per cent. interest, would be void. As Bowen L.J. says, "equity will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and recover what may still remain in equity his own." I cannot understand this. The right of redemption can be sold to any one—to the creditor after the loan. Why may it not be dealt with by creditor and debtor at the time of the loan? It cannot. It seems that a borrower was such a favourite with courts of equity that they would let him break his contract, and, perhaps, by disabling him from binding himself, disable him from contracting on the most advantageous terms to himself. For the learned counsel for the appellants said there were ways in which this extraordinary doctrine could be evaded. However, this is the rule, as I believe. James L.J. once carried it still further, and held that the creditor must hand over a security procured by the creditor, which never belonged to the debtor, which cost him nothing, and which did not in any way affect him (1). This was overruled most properly (2). I cite the case for the purpose of seeing whether the claim here is within the general rule I have mentioned, or within the principle that governed the decision that overruled James L.J.

(1) See *Bruce* v. *Garden*, L. R. 8 Eq. 430.

(2) L. R. 5 Ch. 32.

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Now, I take it to be clear that Lord Compton agreed that in the event that has happened his representatives should have no claim on the policy; but that agreement will not prevent the rule that "equity will permit no attempt to clog the borrower's right to redeem." There were three possible events of the transaction. Lord Compton might survive the Marquis and nothing would be payable under the policy, but he would be liable to the appellants for the premiums they had paid. He might pay off the debt and have the policy, and, of course, the other securities, but he would be liable for the premiums paid. Lord Compton might die before the Marquis, and then his representatives would be entitled, notwithstanding Lord Compton's agreement, to the £34,500, less the £10,000 interest, premiums and interest on them, if this was an attempt to clog or fetter the right to redeem. Was it? It is admitted and is clear that the case is the same as though the insurance had been by some company other than the appellants'. Suppose it had been, and that the appellants had received from the insurer £34,500, and that principal, interest, premiums and other dues to the appellants had amounted to £20,000 only. Would not Lord Compton's representatives have been entitled to the balance? Would they not have been well entitled to say, "It was, in truth, with Lord Compton's money you insured this sum; deduct that and pay the balance. You did not insure at his expense to make a profit for yourselves. If he had redeemed he would have had to pay you the premiums. If he had survived the Marquis you would have charged them against his life estate?" "No," say the appellants, "the policy never was his; he could not therefore mortgage it: so it is not within the rule against clogging or fettering the right to redeem." But suppose the lenders of the money had not been insurers; suppose they had said to Lord Compton, "Bring a policy of insurance on your life for £34,500 and the other instruments, and we will lend you the £10,000;" can there be a doubt that then they would have had to pay to Lord Compton's representatives the balance? And is there any difference between that case and the actual one? There ought not to be; but equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton practically has been charged is

about 10 per cent. on the sum borrowed, with compound interest. I suppose at his death the sum due from him was about £20,000. If he had agreed to pay the £10,000 and 10 per cent., and there had been no agreement to insure, the appellants would have laid out half the annual amount for insurance, and on his death have kept the sums insured. Can they be considered to have done that, or its equivalent? The resulting figures would have been the same. I think not. The rules of equity may be evaded but must not be infringed. The case does not depend on whether the policy was mortgaged, but on whether there was an additional burthen on redeeming. There was. Had Lord Compton paid on the day appointed, he would have been entitled to the policy. The appellants say he is not if he pay after that time.

I am not struck by the argument that this is a wagering and speculative bargain of one life against another. All life insurance is a sort of wager. I stake £20 a year, as long as I live, against £1000 to be paid my executors when I die. If I die early I win, if I live long I lose.

The case is remarkable. The appellants have a double character. They are lenders of the £10,000; they are insurers of £34,500. They meant by the insurance to secure themselves against loss as lenders. They meant also to secure themselves against loss as insurers. Or, perhaps, that as lenders and insurers their loss should not exceed £10,000 and interest. They would lose that if they succeeded in this appeal. If Lord Compton died before the Marquis, the appellants as creditors lose the £10,000 and interest, but are recouped by the insurance, and then as insurers lose the £34,500, minus principal, interest, and the premiums. If Lord Compton survived the Marquis, then indeed the appellants as lenders lose nothing, and as insurers get the premiums, and it may be that the chance of getting them was worth the risk and almost certain loss if Lord Compton died first. I think the judgment must stand.

I regret to have to come to this decision. I think the equitable rule unreasonable, and I regret to have to disregard the express agreement of a man perfectly competent and advised by competent advisers. If, however, the appellants have insured

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in another office, they really have no claim in fairness on the whole proceeds of the policy. And if they have not insured their claim seems hardly better.

LORD MORRIS :—

My Lords, I have had an opportunity of reading the opinion which has just been delivered by the noble and learned Earl on the Woolsack, and I entirely concur in it, and can add nothing to the reasons he has given.

LORD BRAMWELL :—

My Lords, I regret to say that my noble and learned friend Lord Hannen is unable to attend here to-day. He has sent me his judgment which I will read to your Lordships.

LORD HANNEN :—

My Lords, I greatly regret that I am unable to concur in the opinions which have been expressed by the noble and learned Lords who have preceded me.

The material facts of the case are few and undisputed. Lord Compton, the son of the Marquess of Northampton, required an advance of £10,000. He was entitled to a reversionary interest in certain real estate in the event only of his surviving his father, and he offered a charge on this interest as a security for the repayment of the advance which he desired to obtain from the defendants, representing the National Life Insurance Company. This charge would be valueless in the event which has happened of Lord Compton dying in the lifetime of his father. The defendants therefore stipulated that they should insure the life of Lord Compton against the life of his father, for the sum of £34,500. The interest on the £10,000, and the premiums payable on the policy of insurance were to be allowed to accumulate for five years, at the expiration of which time the defendants were to be at liberty either to sue for the principal, interest, and premiums paid, or to continue to pay the premiums and to allow the interest and premiums to accumulate. In the event of Lord Compton not paying the sums due to the company

during the lifetime of his father, the policy was to belong absolutely to the defendants, and Lord Compton and his representatives were to have no claim or right thereunder. If on the other hand, Lord Compton should pay, before the death of his father, the whole sums due to the defendants, they were bound forthwith to assign the policy to him. In consequence of an inaccuracy in the agreement first drawn up between the parties, a further agreement was executed, by which it was expressly agreed that in the event of Lord Compton predeceasing his father without having paid all principal moneys, interest, and costs due to the defendants, then the policy and all moneys thereby secured should belong absolutely to them.

Lord Compton predeceased his father. The defendants effected a policy in their own company (the National Life Assurance Company), but I think it clear that their position is the same as if they had insured in some other office, and were now in possession of the £34,500 secured by the policy.

The plaintiff's contention is that he is, as representative of his son Lord Compton, entitled to be paid the balance of the £34,500 after deducting the sums due from his son to the company.

It is conceded that this is contrary to the expressed intention of the parties, but it is contended that the transaction is one of mortgage of the policy by Lord Compton, and that he could not fetter his right of redemption by any agreement, however plain.

I accept, as not now open to question, the maxim that what is once a mortgage remains a mortgage, and may be redeemed on payment of the sum for which it was intended merely as a security; but I am unable to see that this transaction was a mortgage at all. A mortgage imports the conveyance to the mortgagee of property belonging to the debtor, or someone other than the mortgagee, by way of pledge for a debt. In the present case the policy of insurance never did belong to the debtor, but was brought into existence by the lenders, accompanied from the first with an express stipulation that it was to belong absolutely to them.

Cases have been referred to which establish that when a policy

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is effected, though in the name of the creditor, if the premiums are to be charged against the debtor, the policy is primâ facie to be regarded as the property of the debtor; but no case has been cited which establishes that this primâ facie inference of the intention of the parties may not be rebutted by express agreement to the contrary; and I can see no reason why the liberty of persons desiring to contract in such a manner should be restricted. It seems clear that the same end might have been attained by a slight change in the form of the contract. If the defendants had stipulated for a rate of interest sufficient to cover the interest now reserved, as well as the amount of the premium necessary to secure the £34,500, their right to the policy effected could not have been disputed; why should the parties be denied the right to contract so as to bring about the same result in the manner they have adopted?

An argument for the plaintiff has been based on the hardship which it is alleged will arise from the defendants' construction of the agreement, namely, that the estate of Lord Compton (if there be any) will remain liable to repay the capital, interest, and premiums, while the defendants will retain the whole £34,500 insured. If this hardship existed it would only be such a hardship as every impecunious person suffers who seeks a loan for which he cannot offer a good security, namely, that he can only borrow on onerous terms; but I am of opinion that the supposed hardship does not exist. The agreement of 14th June 1879 does not abrogate the whole of the 6th clause of the original agreement; it leaves the defendants still bound "to impute" to the debt due to them the moneys received in respect of the policy, but relieves them from the duty to pay over any balance to the representatives of Lord Compton, which had by mistake been imposed on them by the earlier agreement.

The language of the amended agreement appears to have been intended to guard against the possibility of the contention now put forward on the part of the plaintiff, and to provide that in the events which have happened the policy and its proceeds now in dispute should be the property of the defendants and not of Lord Compton's representative. For the reasons I have given, I think that the parties were at liberty to make such a contract,

and, therefore, that the judgment appealed from is erroneous, and should be reversed.

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Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 30th November 1891.

Solicitors for appellants: *Wilde, Berger, & Moore.*
Solicitor for respondent: *H. T. Boodle.*

[HOUSE OF LORDS.]

MOGUL STEAMSHIP COMPANY, LIMITED APPELLANTS;

AND

McGREGOR, GOW & CO., T. SKINNER & CO., D. J. JENKINS & CO., PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY, OCEAN STEAMSHIP COMPANY, WILLIAM THOMPSON & CO., THOMAS SUTHERLAND, F. D. BARNES, ALFRED HOLT, AND JOHN SAMUEL SWIRE . . . . . RESPONDENTS.

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Conspiracy—Combination to keep up Freights—Contract in Restraint of Trade—Illegal Contract—Engrossing particular Trade—Exclusion of Rival Traders from Combination.

Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices.

The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per

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cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs :—

Held, affirming the decision of the Court of Appeal (23 Q. B. D. 598), that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action.

APPEAL from a decision of the Court of Appeal (1). The action was brought by the appellants against the respondents. The statement of claim alleged as follows :—

1. The plaintiffs have suffered damage by reason of the defendants (other than Sutherland, Barnes, Holt, and Swire), as and being owners of numerous steamers trading between ports in the Yangtsekiang River and London, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned by the defendants the Peninsular and Oriental Steam Navigation Company and the Ocean Steamship Company, conspiring together and with other persons at present unknown to the plaintiffs to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs from shippers to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf.

2. The conspiracy consisted and consists of a combination and agreement by and amongst the defendants (other than Sutherland, Barnes, Holt, and Swire) as and being owners of steamers trading as aforesaid and having by reason of such combination and agreement control of the homeward shipping trade, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned as aforesaid, pursuant to which shippers were and are bribed, coerced and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs.

3. In the alternative the conspiracy consisted and consists of a combination and agreement by and amongst the defendants, as and being owners of and interested in steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs

(1) 23 Q. B. D. 598.

and prevent them obtaining cargoes for their steamers trading between the said ports, agreed to refuse and refused to accept cargoes from shippers except upon the terms that the said shippers should not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had the power and intended to carry into effect, did and do prevent shippers from shipping cargoes by the plaintiffs' steamers and threaten and intend to continue so to do.

The plaintiffs claimed damages and an injunction to restrain the defendants from continuing the said wrongful acts. An application for an interim injunction was refused by Lord Coleridge C.J. and Fry L.J (1). The following are the material facts proved at the trial of the action before Lord Coleridge C.J. without a jury.

The appellant company was incorporated in 1883 and took over the steamers owned by Gellatly & Co., and among them the SS. *Pathan*, *Afghan*, and *Ghazee*, which were in China in the tea seasons of 1884 and 1885. Gellatly & Co. were the principal owners in and managers of the appellant company, and were also the London outward loading brokers of the Ocean Steamship Company. The respondents were owners of, or managing owners interested in, steamers engaged in the trade between China and England and elsewhere.

The "tea season" in China lasts about five to six weeks, beginning from the latter part of May. Tea exported during the season from Hankow for England is either shipped there (600 miles up the river Yangtsze) direct for England or sent to Shanghai (at the mouth of the river) and there re-shipped. The defendants desired to secure this trade for themselves and to maintain freights at remunerative rates. With this object they had in some previous years agreed among themselves to regulate the amount of tonnage to be sent up to Hankow and the freights to be demanded. In the spring of 1884 they held a conference, as the result of which they issued to merchants and shippers in China the following circular:—

"Shanghai, 10th May 1884.

"To those exporters who confine their shipments of tea

(1) 15 Q. B. D. 476.

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and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. & O. S. N. Co.'s, M. M. Co.'s, O. S. N. Co.'s, *Glen, Castle, Shire* and *Ben* lines and to the SS. *Oopack* and *Ningchow*, we shall be happy to allow a rebate of 5 per cent. on the freights charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made or been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by other than the said lines. Shipments by the SS. *Albany, Pathan,* and *Ghazee* on their present voyages from Hankow will not prejudice claims for returns. Each line to be responsible for its own returns only, which will be payable half-yearly commencing the 30th of October next. Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

"The foregoing agreement on our part to be in force from present date till the 30th of April 1886."

The plaintiffs (who were not members of the conference) were admitted to the benefits of the arrangement in respect of their vessels the *Pathan* and *Ghazee* for the homeward voyage of that season only.

In 1885 the defendants held another conference and came to a written agreement, dated the 7th of April, which regulated as between the defendants the tea trade with China and Japan, and provided for a certain division of cargoes, for the determination of the rates of freight and for the continuance of the rebate of 5 per cent. It also provided that if "outsiders" should start for Hankow, Conference steamers must meet them there, the selection of tonnage to be employed for this purpose being left to the Shanghai agents of the lines in consultation together, the number to be limited as much as consistent with effective opposition. That should there not be a Conference steamer in port or named for despatch within a week with available cargo space, shipments made by an outsider during that period should not invalidate the claim for the rebate of 5 per cent. on the freights. That agents of Conference

steamers in China and Japan should be prohibited from being interested directly or indirectly in opposing steamers, or in the loading of sailing vessels of outsiders. And that the agreement might be terminated at any time on notice being given by the party wishing to retire to each of the others, but only by principals at home and not by agents abroad. Copies of this agreement were sent by the defendants to their agents at Shanghai. The plaintiffs desired to join this conference, but were excluded from it and from all its benefits, and in May 1885 sent the *Pathan* and *Afghan* to Hankow to endeavour to secure homeward cargoes. The defendants' agents at Shanghai thereupon sent to shippers at Hankow the following circular:—

"Private. Shanghai, 11th May 1885.

"Referring to our circular dated the 10th of May 1884 we beg to remind you that shipments for London by the S.S. *Pathan*, *Afghan* and *Aberdeen*, or by other non-Conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made even although the firm elsewhere may have given exclusive support to the Conference lines."

The defendants also despatched some Conference steamers to Hankow to oppose the *Pathan* and *Afghan* and secure the freights if possible to the exclusion of non-Conference vessels, and with this object they underbid the plaintiffs and caused a general reduction of freights at Hankow. In the result the *Pathan* and *Afghan* obtained freights, but at very low and unremunerative rates. A letter of the 1st of May was put in from the chairman of the P. & O. Co. to their agent at Shanghai to the effect that if a firm of agents at Hankow (who acted there both for that company and for the plaintiffs) should carry out their intention of loading the plaintiffs' vessels home the P. & O. Co. would have to close their relations with them. On the 28th of May Gellatly & Co. were dismissed from the agency of the Ocean Steamship Company.

The action was brought on the 29th of May 1885. It was agreed that the damages should if necessary be ascertained

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by a reference. Lord Coleridge C.J. made an order entering judgment for the defendants with costs (1). That order was affirmed by the Court of Appeal (Bowen and Fry L.JJ., Lord Esher M.R. dissenting (2)).

April 14, 16, 17, 20, 21; May 11. Sir *Henry James* Q.C. and *Gorell Barnes* Q.C. (*Sims Williams* with them) for the appellants:—

The acts of the defendants were actionable on several grounds. The combination and agreements were in restraint of trade, and therefore void and illegal: *Hilton* v. *Eckersley* (3) and *Hornby* v. *Close* (4). They were carried into effect by wrongful and unlawful methods, viz.: by offering undue advantage (a rebate on the freights) to those who accepted the terms, and by imposing a penalty on those who refused them. Seeking to increase one's own trade is in itself legitimate, but seeking to deprive a rival of his trade or to prevent him carrying it on is not; à fortiori when wrongful means are employed. The allowance of rebate to those shippers who would agree to ship only by Conference steamers; the sending special steamers to Hankow to oppose the plaintiffs' steamers and prevent them obtaining any cargoes by offering to carry at very low rates; the reduction of freights to a ruinous point; the threats to dismiss and the dismissal of agents who acted for the plaintiffs, were all wrongful means, and were put in force not merely to increase the defendants' own trade but to drive the plaintiffs out of the trade and make it impossible for them to carry it on. The restrictions imposed by the combination on the free action of the members made the combination void and illegal as in restraint of trade; and there is the authority of Crompton J. in *Hilton* v. *Eckersley* (5) that such combinations are "illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade." That dictum was not supported by the other judges in the Queen's Bench, but the judgment of the Exchequer Chamber delivered by Alderson B. leaves open for future decision the question whether an indict-

(1) 21 Q. B. D. 544.
(2) 23 Q. B. D. 598.
(3) 6 E. & B. 47.
(4) Law Rep. 2 Q. B. 153.
(5) 6 E. & B. 47, 53.

ment would lie. Assuming that it would an action clearly lies at the suit of any one person who has suffered special damage. The ground of illegality is that such agreements are contrary to public policy: see the cases collected in the notes to *Mitchel* v. *Reynolds* (1), beginning with *Dier's Case* (2); also the *Ipswich Tailors' Case* (3); the case of a blacksmith (4). In *Cousins* v. *Smith* (5) Lord Eldon held that a combination of wholesale grocers to purchase all imported fruit so that those who would not buy from them exclusively should not have any supply was "a conspiracy against the world at large" and illegal. "A combination to violate a private right in which the public has a sufficient interest is a crime, such a violation being an actionable wrong:" Sir W. Erle on Trade Unions, p. 32. The defendants' combination not only interfered with the right of those who were parties to it to regulate their own mode of carrying on their trade but interfered with the right of the plaintiffs and of all shippers in that business to a free course of trade, and passed the limits of fair competition. The object of the defendants and the natural effect of their acts was to drive away the plaintiffs and all other competitors and then to keep freights at a high rate. This was contrary to public policy and amounted to a public mischief: the interest of shippers and consumers being to have low freights. Driving away or terrifying a man's customers so as to secure them for oneself is like firing guns near another's decoy to frighten the ducks and have a chance of shooting them, and is therefore actionable: see *Keeble* v. *Hickeringill* (6); *Hannam* v. *Mockett* (7), and the early cases collected in 1 Bac. Abr. tit. Action on the case (A) p. 101. The present case is analogous to that of maliciously procuring a breach of contract so as to injure a rival and benefit oneself: see *Lumley* v. *Gye* (8). And it matters not whether the wrongful act be done for the indirect purpose of injuring the plaintiffs or of benefiting the defendants at the expense of the plaintiffs; it is equally actionable: *Bowen* v. *Hall* (9). The defendants could not gain the exclusive trade

(1) 1 Sm. L. C. 9th ed. p. 444.
(2) Year Book, 2 Hen. 5, fol. 5, pl. 26.
(3) 11 Rep. 101.
(4) 2 Leon. 210, case 259.
(5) 13 Ves. 542.
(6) 11 East, 574, n.
(7) 2 B. & C. 934.
(8) 2 E. & B. 216.
(9) 6 Q. B. D. 333, 338.

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and benefit themselves without taking it away from the plaintiffs and injuring them. To constitute malice in law it is not necessary to shew ill-will against a person, it is enough if the act be wrongful, done intentionally without just cause or excuse: *Bromage* v. *Prosser* (1), per Bayley J. Upon these principles the action would be maintainable if there were only one defendant. But this is a case of concerted action by several, of conspiracy—a much stronger case. Many things done by an individual are not actionable, which done by several in combination are. "All confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person:" 2 Hawk. P. C. c. 72, s. 2; 3 Russell on Crimes, 5th ed. p. 109. Here the intention was to drive the plaintiffs out of the trade and the natural result would be to impoverish them. "A conspiracy to raise the price of pepper is punishable": *R.* v. *Starling* (2). One spectator in a theatre may hiss an actor but a concerted plan by several is an indictable offence: *Clifford* v. *Brandon* (3). And an action lies: *Gregory* v. *Duke of Brunswick* (4). A combination among military officers of the East India Company to throw up their commissions in order to force the company to grant a larger allowance was said to be a criminal act: *Vertue* v. *Lord Clive* (5). A combination not to sell articles of trade under certain prices or not to work under certain prices is at common law an indictable offence: *Rex* v. *Eccles* (6) per Lord Mansfield. To constitute a conspiracy it is enough if the acts agreed to be done, though not criminal, amount to a civil wrong: *Reg.* v. *Warburton* (7) per Cockburn C.J. A conspiracy is an agreement by two or more to do an unlawful thing or to do a lawful thing by unlawful means, and a combination by servants to leave their employment in breach of their contracts is indictable, notwithstanding 34 & 35 Vict. c. 31 s. 2 which enacted that the purposes of a trade union should not, by reason merely that they are in restraint of trade, be deemed to be

(1) 4 B. & C. 247, 255.
(2) 1 Keb. 650.
(3) 2 Camp. at p. 372, n.
(4) 6 Man. & G. 953.
(5) 4 Burr. at p. 2476.
(6) 1 Lea. C. C. 274, 276.
(7) Law Rep. 1 C. C. 274, 276.

unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise: *Reg.* v. *Bunn* (1); and see *Reg.* v. *Duffield* (2); *Reg.* v. *Parnell* (3).

In the American Courts, the law as to associations such as the present has been clearly laid down. In *Stanton* v. *Allen* (4) the Supreme Court of New York held in 1848 that a combination by boatowners to regulate freights and divide profits was against public policy and void because its tendency was to increase prices, prevent wholesome competition, and diminish the public revenue. See also *State* v. *Glidden*, cited in *State* v. *Stewart* (5). A combination to do acts to the prejudice of the public or oppressive to individuals gives a right of action to any one who is injured by it: *Morris Run Coal Company* v. *Barclay Coal Company* (6); *Hooker* v. *Vandewater* (7); *Salt Company* v. *Guthrie* (8). A corporation is intended by the law to exercise the franchises conferred upon it for the benefit of the public; and a trading corporation which with others gives control of its business to an association in order to prevent competition and raise prices will be dissolved: *People of the State of New York* v. *North River Sugar Refining Company* (9).

Sir *Charles Russell* Q.C. and Sir *Horace Davey* Q.C. (*Finlay* Q.C. *Pollard* and *Box* with them) for the respondents:—

To maintain this action the plaintiffs must shew that some legal right of theirs has been infringed by the defendants. What legal right has been assailed? The combination was formed solely to protect and further the defendants' own trade interests, and there is no evidence of an intention to injure the plaintiffs except so far as every trader tries to get business, the result of which may be to injure his rivals. The defendants infringed no legal right in offering a rebate to those who would deal exclusively with them, or in sending steamers to underbid the plaintiffs, or in reducing freights so as to drive the plaintiffs out of the trade, or in dismissing from their agency persons who were

(1) 12 Cox, C. C. 316.
(2) 5 Cox, C. C. 404, 429.
(3) 14 Cox, C. C. 508, 513.
(4) 5 Denio, N. Y. 434.
(5) 59 Amer. R. at pp. 721, 724.
(6) 68 Penn. 173, 186.
(7) 4 Denio, N. Y. 349.
(8) 35 Ohio St. 666, 672.
(9) 54 Hun, (61 N. Y. Sup. Ct.) 354.

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assisting their rivals. These acts are common—almost universal—in every department of trade where competition is keen, and no authority has been cited which shews that any legal right of the plaintiffs has been infringed. At common law a common carrier is bound to charge reasonably but not to charge equally: *Branly* v. *South Eastern Railway Company* (1), and the offering a rebate violates no right. Even the motive to injure a neighbour will not make an act actionable if done in the exercise of a right; e.g. setting up a shop near a rival; and see the illustrations put by Lord Penzance in *Capital and Counties Bank* v. *Henty* (2). The right of firing guns, driving on a highway and the like, is a qualified right: it must not be exercised to the injury of other persons. But the right of free competition in trade is an absolute right. Even if such a combination as the present were void as being in restraint of trade it would give the plaintiffs no cause of action. Such agreements are illegal only in the sense that the law will not enforce them; they are not immoral, and (except the dictum of Crompton J., with which Lord Campbell C.J. and Erle J. differed and which has never been followed) there is no authority for saying that an indictment will lie against the parties. But if it were necessary to determine the point there is good reason for holding such an agreement as the present valid. The restriction on trading was not general but partial, the agreement was for a limited time, was reasonable and founded on a good consideration, and any of the parties to it might retire upon giving notice. See the judgment in *Collins* v. *Locke* (3). As to the argument from public policy Burrough J. said in *Richardson* v. *Mellish* (4) "I protest against arguing too strongly upon public policy:—it is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." And see the observations passim in *Egerton* v. *Earl Brownlow* (5). Whether such combinations and agreements are on the whole beneficial or not to the public is a question not of law but of political economy as to which there

(1) 31 L. J. (C.P.) 286.
(2) 7 App. Cas. at p. 766.
(3) 4 App. Cas. 674.
(4) 2 Bing. at p. 252.
(5) 4 H. L. C. 1.

will always be a difference of opinion. The plaintiffs have not brought the case within their own definition of conspiracy: neither the acts agreed to be done, nor the means adopted for doing them have been shewn to be unlawful. It is not as if there had been fraud or misrepresentation or violent interference with a man's customers or trade, or intimidation or molestation or obstruction, of which *Green* v. *London General Omnibus Company* (1) is an example. The principles by which this case is governed are clearly explained in the judgments of Bowen and Fry L.JJ. (2).

Sir *H. James* Q.C. in reply contended that a conspiracy to do any act which though not in itself indictable was unlawful was an indictable offence, and that an action lay at the suit of any person who was injured by such a conspiracy; and referred to conspiracies to debauch: e.g. *Reg* v. *Lord Grey* (3); *Reg* v. *Mears* (4); and *Reg* v. *Howell* (5).

The House took time for consideration.

Dec. 18. LORD HALSBURY, L.C.:—

My Lords, notwithstanding the elaborate examination which this case has undergone, both as to fact and law, I believe the facts may be very summarily stated, and when so stated the law seems to me not open to doubt.

An associated body of traders endeavour to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who will deal exclusively with them; so favourable that but for the object of keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves.

I do not think that I have omitted a single fact upon which

(1) 7 C. B. (N.S.) 290.
(2) 23 Q. B. D. 611, 620.
(3) 9 St. Trials, 127.
(4) 20 L. J. (M.C.) 59.
(5) 4 F. & F. 160.

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the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that primâ facie a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber (1), and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law."

Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyses what is the real meaning of such phrases it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favourable terms, that is to say, the reduced freights, discounts, and the like which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all

(1) *Hilton* v. *Eckersley*, 6 E. & B. at pp. 74, 75.

competition must be malicious and consequently unlawful, a sufficient reductio ad absurdum to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, or interference was proved against the associated body of traders, and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.

The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders, would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by "out of the ordinary course of trade"? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the Court below:—"All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'"

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the

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wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism (1) (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord Bramwell in *Reg.* v. *Druitt* (2), if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition.

But in this case the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders; and

(1) 21 Q. B. D. 551. (2) 10 Cox, C. C. 592.

if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade: and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word "unlawful," which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as *contrary to law*, is not applicable to such contracts.

It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract; and Mr. Justice Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision, and therefore manifestly obiter) that the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

In the result, I think that no case whatever is made out of a conspiracy such as the appellants here undertook to establish;

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and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful; but as I have already said, in proof there is nothing but the competition with which I have dealt.

The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case, and the word "induced" is absolutely neutral, and no unlawful inducement is proved.

The third paragraph uses language such as "intention to injure the plaintiffs," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether if the indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offence? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move your Lordships.

LORD WATSON:—

My Lords, at the hearing of this appeal in April last, your Lordships had the benefit of listening to a learned and exhaustive discussion of the law applicable to combination or conspiracy. It appeared to me at the time, and further consideration has confirmed my impression, that much of the legal argument ad-

dressed to us had a very distant relation to the circumstances of the present case, which are simple enough. The evidence, oral and documentary, contains an unusual amount of figurative language, indicating a wide difference of opinion as to the legal aspect of the facts, but presents no conflict in regard to the facts themselves.

The respondents are firms and companies owning steam vessels which ply regularly, during the whole year, some of them on the Great River of China between Hankow and Shanghai, and others between Shanghai and European ports. During the tea season, which begins in May and lasts for about six weeks, most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then transhipped for Europe. Accordingly they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels.

The appellants are also a shipowning company. They do not maintain a regular service either on the Great River or between Europe and Hankow; but they send vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear, in ordinary circumstances, to have been considerable.

The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the appellants and other outsiders from obtaining a share of the trade. The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates; and they claim as damages due to them by the respondents, the difference between their actual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents. As the law is now settled, I apprehend that in order to substantiate their claim, the appellants must shew, either that the object of the agreement was unlawful, or that illegal methods were resorted

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to in its prosecution. If neither the end contemplated by the agreement, nor the means used for its attainment were contrary to law, the loss suffered by the appellants was damnum sine injuriâ.

The agreement of which the appellants complain left the contracting parties free to recede from it at their pleasure, and is not obnoxious to the rule of public policy, which was recognised in *Hilton* v. *Eckersley* (1). The decision in that case, which was the result of judicial opinions not altogether reconcilable, appears to me to carry the rule no farther than this—that an agreement by traders to combine for a lawful purpose, and for a specified time, is not binding upon any of the parties to it if he chooses to withdraw, and consequently cannot be enforced in invitum. In my opinion it is not an authority for the proposition that an outsider can plead the illegality of such a contract, whilst the parties are willing to act, and continue to act upon it. I venture to think that the decision of this appeal depends upon more tangible considerations than any which could be derived from the study of what is generally known as public policy.

There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce; and it is, in the eye of the law, perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal.

The object of the combination being legal, was any illegal act committed by the respondents in giving effect to it? The appellants invited your Lordships to answer that question in the affirmative, on the ground that the respondents' competition was

(1) 6 E. & B. 47.

unfair, by which they no doubt meant that it was tainted by illegality. The facts which they mainly relied on were these; that the respondents allowed a discount of 5 per cent. upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels; that, whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to underbid her, so that neither vessel could obtain cargo on remunerative terms; and lastly, that the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination.

I cannot for a moment suppose that it is the proper function of English Courts of Law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land, it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency at first appeared to me to be a matter attended with difficulty; but on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage.

My Lords, in this case it has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavoured to obtain shipments for their vessels, to the exclusion of others, was the inducement of cheaper rates of freight than the appellants were willing to accept. I entertain no doubt that the judgment appealed from ought to be affirmed. I am quite satisfied with the reasons assigned for it by Bowen and Fry L.JJ.; and the observations which I have made were not meant to

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add to these reasons, but to make it clear that in my opinion the appellants have presented for decision no question of fact or law attended with either doubt or difficulty.

LORD MACNAGHTEN :—

My Lords, the judgment which I am about to read is the judgment of my noble and learned friend Lord Bramwell, who is unable to be present here this morning and has asked me to read it for him.

LORD BRAMWELL :—

My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them. The plaintiffs admit that materially and morally they have been at liberty to do their best for themselves without any impediment by the defendants. But they say that the defendants have entered into an agreement in restraint of trade; an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring this action.

The plaintiffs have proved an agreement among the defendants, the object of which was to prevent shipowners, other than themselves, from trading to Shanghai and Hankow. The way in which that was to be accomplished was by giving benefits to those who shipped exclusively by them, by sending vessels to compete with the plaintiffs', and by lowering their, the defendants', rates of freight so that the plaintiffs had to lower theirs to their great loss. There are other matters alleged, but they are accessorial to the above, which is the substance of the complaint.

The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have

their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons, that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two; one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes: de minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several.

The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. "Public policy," said Burrough J. (I believe, quoting Hobart C.J.), "is an unruly horse, and dangerous to ride" (1). I quote also another distinguished judge, more modern, Cave J.: "Certain kinds of contracts have been held void at Common Law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" (2). I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade, a further supply would have been a waste. There are

(1) *Richardson* v. *Mellish*, 2 Bing. at p. 252. (2) [1891] 1 Q. B. 595.

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some people who think that the public is not concerned with this—people who would make a second railway by the side of one existing, saying "only the two companies will suffer," as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent a waste, and was not good for the public. Lord Coleridge thought it was—see his judgment.

As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit; but, as a rule, it is clear that the expense of transit, and all other expenses, borne by an exported article *that has a market price*, are borne by the importer, therefore, ultimately, by the consumer. So that low freights benefit him. To go on with the case, take it that the defendants had bound themselves to each other; I think they had, though they might withdraw. Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of *Hilton* v. *Eckersley* (1), and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make out that it was an offence, a crime, a misdemeanour. I am clearly of opinion it was not. Save the opinion of Crompton J. (entitled to the greatest respect, but not assented to by Lord Campbell or the Exchequer Chamber), there is no authority for it in the English law.

It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man and wife, without marrying. The agreement is illegal, and could not be enforced, but clearly the parties to it would not be indictable. It ought to be enough to say that the fact that there is no case where there has been a conviction for such an offence as is alleged against the defendants is conclusive.

It is to be remembered that it is for the plaintiffs to make

(1) 6 E. & B. 47.

out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to prove the negative. There are some observations to be made. It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of "fair competition"? What is unfair that is neither forcible nor fraudulent? It does seem strange that to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection.

There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable inter se, but not indictable. The Legislature has now so declared. The enactment is express, that agreements among workmen shall be binding, whether they would or would not, but for the Acts, have been deemed unlawful, as in restraint of trade. Is it supposable that it would have done so in the way it has, had the workmen's combination been a punishable misdemeanour? Impossible. This seems to me conclusive, that though agreements which fetter the freedom of action in the parties to it may not be enforceable, they are not indictable. See also the judgment of Fry L.J. on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighbourhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember the conspiracy is the offence, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might shew that from his skill he would have beaten one or both of the others. See in this case the judgment of Lord Esher, that the plaintiffs might recover for "damages at large for future years." Would a shipowner who had intended to send his ship to Shanghai, but desisted owing to the defendants' agreement, and on being told

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by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it?

The Master of the Rolls cites Sir William Erle, that "a combination to violate a private right in which the public has a sufficient interest is a crime, such violation being an actionable wrong." True. Sir William Erle means that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case, I hold that there is no private right violated. His Lordship further says: "If one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade, in order—that is to say, with intent—to molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong" (1). I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on "course of trade" and "molest." But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here. The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done in the exercise of their own free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plaintiffs' right; and as injury to the plaintiffs followed, they had a right of action. I cannot agree. If there were two shopkeepers in a village and one sold an article at cost

(1) 23 Q. B. D. 607.

price, not for profit therefore, but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry L.J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts" (1). It is a strong thing for the plaintiffs to complain of the very practices they wished to share in, and once did.

I am of opinion that the judgment should be affirmed.

LORD MACNAGHTEN:—

My Lords, for myself I agree entirely in the motion which has been proposed, and in the reasons assigned for it in the judgments which have been delivered and in those which are yet to be delivered; and I do not think I can usefully add anything of my own.

LORD MORRIS:—

My Lords, the facts of this case demonstrate that the defendants had no other, or further, object than to appropriate the trade of the plaintiffs. The means used were: firstly, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of the freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs.

The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons. Of the first four of the means used by the defendants, the rebate to customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal exclusively with them. The sending of ships to compete, and the indemnifying other ships, was "the competition" entered on by the defendants with the

(1) 23 Q. B. D. 625, 626.

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plaintiffs. The fifth means used, viz., the dismissal of agents, might be questionable according to the circumstances; but in the present case, the agents filled an irreconcileable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade.

All the acts done, and the means used, by the defendants were acts of competition for the trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce any one to break such. Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it.

Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. And the defendants' case clearly comes within the principle I have stated.

Now, as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was, in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise.

I cannot see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these

days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair" intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another.

But suppose the combination in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void, because its tendency might be held to be against the public interests. Does that make, *per se*, the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime; and cases abound of agreements which the law would not enforce, but which are not illegal; which you may enter into, if you like, but which you will not get any assistance to enforce.

My Lords, I have merely summarised my views, because I adopt entirely the principles laid down by Lord Justice Bowen in his judgment with such felicitous illustrations, and I concur in the opinion already announced by your Lordships, that the judgment of the Court of Appeal should be affirmed.

LORD FIELD :—

My Lords, I think that this appeal may be decided upon the principles laid down by Holt C.J., as far back as the case of *Keeble* v *Hickeringill*, cited for the appellants (1). In that case the plaintiff complained of the disturbance of his "decoy" by the defendant having discharged guns near to it and so driven away the wild-fowl, with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. Holt C.J, however, held that the action, although new in instance, was not new in reason or principle, and well lay, for he said that the use of a "decoy" was a lawful trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is

(1) 11 Mod. 74, 131, and note to *Carrington* v. *Taylor*, 11 East, 574.

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caused by "a violent or malicious act;" suppose "for instance," he said, "the defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong." But, he added, if the defendant, "using the same employment as the plaintiff," had set up another decoy so near as to spoil the plaintiff's custom, no action would lie, because the defendant had "as much liberty to make and use a decoy" as the plaintiff. In support of this view he referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats.

It follows therefore from this authority, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action.

Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although if done by an individual no such consequence would have followed, but I think that in all such cases it will be found that there existed either an ultimate object of malice, or wrong, or wrongful means of execution involving elements of injury to the public, or, at least, negativing the pursuit of a lawful object.

Now, applying these principles to the case before your Lordships, it appears upon the evidence that the appellants and respondents are shipowners, and have for many years been engaged, sometimes in alliance, at other times in competition,

in the carrying trade of the eastern seas to and from Europe and elsewhere. A very important portion of this trade consists of a large amount of freight to be earned at the ports of Hankow and Shanghai during the season by carrying to Europe the teas brought there for shipment, and it was of the respondents' action in that business during the season of 1885 that the appellants complain. They do not allege that the respondents have been guilty of any act of fraud or violence, or of any physical obstruction to the appellants' business, or have acted from any personal malice or ill-will, but they say that the respondents acted with the calculated intention and purpose of driving the appellants out of the Hankow season carrying trade by a course of conduct which, although not amounting to violence, was equally effective, and so being in fact productive of injury to them was wrongful and presumably malicious.

It appeared upon the evidence that both parties have been for some years trading in competition at Hankow for tea freights, which amounted to a very considerable sum, and the earning of which was spread over a short annual season. The trade was carried on by a large number of independent shipowners, and the tonnage which was employed may be roughly divided into two classes:—First, tonnage engaged in regular lines to and from ports in the China and Japan seas all the year through, loading both outwards and inwards; and secondly, tonnage loading generally outwards to ports in Australia or elsewhere, and only seeking freights and taking up "homeward" berths at Hankow during the short period when freights are abundant there and scarce elsewhere. The several respondents and the "Messageries Maritimes" of France represent substantially the first class of shipowners. The appellants and other shipowners, who are no parties to this record, but some of whom were in alliance with the appellants, in the same interest, forming a very influential class of traders, may be taken to represent the second.

The two ports of Hankow and Shanghai are the centres of these competing interests, and it is hardly necessary to add that the competition was very severe, and the accumulation of tonnage for "homeward" freights produced by the circulation of an excessive

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number of ships rendered rates so unremunerative that in each of the years 1879, 1883, and 1885, a combination of shipowners, known as a "conference," was formed, consisting in the main of the first class of owners, with the object of limiting the amount of tonnage to be sent up the river, and thus securing enhancement and regularity of rates.

That the parties to these agreements did not suppose that they were doing anything violent or malicious, or were parties to a conspiracy, rendering themselves liable to action or indictment, is clear from the fact that in 1879 Messrs. Gellatly & Co., who then owned the ships of which the appellants are now the owners, and in 1884 the appellants (whose managers Messrs. Gellatly were and are) were parties to them, and in 1885 desired to become so, and only brought their present action because the other parties to the conference of that year refused to extend its provisions to them and others in the same commercial position.

The grounds upon which this refusal was based by the respondents were purely of a commercial and in no way of a personal character. They said that in forming what they considered as the regular China and Japan trade out and home they supplied the trade with tonnage in season and out of season, and that it was hard upon them that at times when cargo necessary for their requirements, in order to fill the space required for outward shipments, and to make their adventure remunerative, was to be obtained, that cargo should be absorbed by vessels that only entered the trade when trade homewards was slack elsewhere.

It is absolutely unnecessary to consider whether these grounds were morally or commercially justifiable. They were not unlawful, and they were of a nature legitimately, if not necessarily, to be taken into account in carrying on the respondents' business with profit. Indeed, the question between the parties at that time was not whether such combination should exist or not, but where the line should be drawn. It was in this state of things that the season of 1885 opened.

Under the conference agreement of 1884 it had been agreed between the conference owners and the appellants that the latter should load homewards from Hankow for that season two

of their Australian outward-going ships upon conference terms and rates; and when in the latter part of 1884 negotiations were set on foot for the establishment of a conference in 1885 the appellants were desirous of at least retaining the same position in future. They therefore requested Mr. Holt, one of the respondents, an influential member of the conference and personal friend of Mr. Gellatly, to bring the matter before them. In the meanwhile the effect of unrestricted competition had been such as to produce what was termed "a collapse of freights," with the result that negotiations for a new conference ended in an agreement to that effect, bearing date the 7th of April, the terms of which were in most, if not in all important respects, similar to the agreement of 1884.

The first object of the parties to this agreement was to limit as between themselves the number of ships, and it therefore provided that if no other ships than those of the conference owners went, no more than six conference ships should go up the river to Hankow; but then in order to meet the threatened competition of the appellants and others it was provided that if "outsiders" started, additional steamers should meet them, such conference steamers to be limited in number "as much as was consistent with effective opposition." Principles were also laid down for rates of freight and distribution of cargo and freights among conference owners, and in order to induce shippers to ship with them exclusively it was provided that returns should be made upon the same terms as previously arranged by the agreement of 1884 (to which the appellants had been parties) to all exporters who should confine their shipments to conference ships.

Whilst the negotiations for this agreement were pending, Mr. Gellatly, a large shareholder in the appellant company, in company with Mr. Thompson, a shipowner with large tonnage at command, who was also desirous of becoming a member of the conference, had both correspondence and interviews with several of the conference owners, in which they claimed to be admitted to the terms of it, but the latter persistently objected upon the ground that I have before stated, and in the result Mr. Gellatly and Mr. Thompson declared that their vessels should certainly

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go up to Hankow the ensuing season, as, no matter what the rates were, they thought (as indeed appears to have been the result) that the loss to the conference would be greater than to them.

No agreement could therefore be come to between the two parties, and in the result the appellants and Mr. Thompson placed ships of very considerable tonnage, which had made their outward voyage to Australian ports, upon the Hankow berth, and the respondents sent up the additional ships provided for by the conference agreement, not only to compete with the appellants' and Mr. Thompson's ships, but also to deter others from following.

On the 11th of May the respondents also sent out a circular to shippers, referring to a similar circular issued under the conference agreement of 1884, by which they reminded those to whom it was sent that shipments for London by the SS. *Pathan* and *Afghan* (two of the appellants' ships) and the *Aberdeen* (Mr. Thompson's), or by other con-conference steamers, at any of the ports in China or at Hong Kong, would exclude those making such shipments from participation in the returns to shippers.

The competition thus created was persisted in during the whole first tea season, each party procuring, or endeavouring to procure, freights, and circulating their ships at reduced rates, with the result that the three opposing ships of the appellants and Mr. Thompson, the *Pathan*, the *Afghan*, and the *Aberdeen*, loaded full cargoes home at very low rates, and many of the conference ships had to go away empty.

It was under these circumstances that the appellants brought the present action, in which they in substance complain, first, of the return of 5 per cent. to the shippers who have not shipped with the appellants, and of the circular to that effect; secondly of the placing upon the berths of extra ships in order to meet the appellants' and other vessels; and thirdly, the reduction of freights to an unremunerative extent with the object of securing cargo. I fail, however, to see that any of those things are sufficient to support this action. Everything that was done by the respondents was done in the exercise of their right to carry on

their own trade, and was bonâ fide so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.

It remains to consider the further contention of the appellants that these acts of the respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being in restraint of trade, and so against public policy, and illegal; but this contention, I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have or had any such result, nor, even if it had, has any authority (except one, no doubt entitled to great weight, but which has not met with general approval) been cited to shew that such an agreement even if void is illegal, nor any that, even if it be so, any action lies by an individual.

For these, and the other reasons given by the learned Lords Justices Bowen and Fry, and which I need not recapitulate, I think that the appeal fails, and ought to be dismissed.

LORD HANNEN:—

My Lords, it is not necessary that I should recapitulate the facts of this case; they have been fully stated in the opinions which have been already delivered. The charge against the defendants is that they conspired together to prevent the plaintiffs from obtaining cargoes for their ships by bribing, coercing, and inducing shippers to forbear from shipping cargoes by the plaintiffs' steamers; and it is further complained that the defendants, with intent to injure the plaintiffs, agreed to refuse, and refused to accept cargoes, except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers.

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The means by which these alleged objects were sought to be attained were: (1.) Offering to shippers and their agents a rebate of 5 per cent. on the agreed freights, to be made to those who, during a fixed period, shipped only by the defendants' steamers. (2.) Sending steamers to Hankow to compete with the steamers of persons not members of the defendants' conference or combination, so as to drive them from the trade of that place. (3.) Removing from the agency of defendants' steamers those persons who acted in the interest of non-conference steamers.

It was contended that the agreement between the defendants to act in combination which was proved to exist, was illegal as being in restraint of trade. I think that it was so, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: *Hilton* v. *Eckersley* (1). But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy, and I think that the opinion to that effect expressed by Crompton J. in *Hilton* v. *Eckersley* (1) is erroneous.

The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such an agreement, can recover damages from them for the injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain ports. It cannot, I think, be reasonably suggested that this is unlawful in any sense of the word. The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can. If then the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This

(1) 6 E. & B. 47.

is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals.

With regard to the sending of ships to Hankow to compete with the plaintiffs' ships, that appears to have been done in order that the defendants' customers might have the opportunity of sending their goods without forfeiting their right to a rebate. No obstruction was offered by these ships to the ships of non-conference owners, and by their presence at Hankow shippers were left simply to determine whether it was to their pecuniary interest to ship by the defendants' vessels or by others. The removing from the agency of the defendants' vessels those persons who acted in the interest of non-conference steamers, appears to me a legitimate mode of securing agents whose exertions would be exclusively devoted to the furtherance of the defendants' trade.

I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself.

I consider that a different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.

It only remains for me to refer to the argument that an act which might be lawful for one to do, becomes criminal, or the subject of civil action by any one injured by it, if done by several combining together. On this point I think the law is accurately stated by Sir William Erle in his treatise on the law relating to Trades Unions. The principle he lays down is equally applicable to combinations other than those of Trades Unions. He says (page 23): "As to combination, each person has a right to choose whether he will labour or not, and also to choose the

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terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise and declare singly, many, after consultation, may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms, but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination."

In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer.

For these reasons I think that the judgment of the Court of Appeal should be affirmed.

Order of Lord Coleridge C.J. and order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals 18th December 1891.

Solicitors for appellants: *Gellatly & Warton.*
Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

HAGGARD . . . . . DEFENDANT;

AND

PELICIER FRÈRES . . . . . PLAINTIFFS.

J. C.*
1891
Nov. 12;
Dec. 5.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Law of Madagascar—Power of Judge of the Consular Court—Order in Council of 1869*—Action for Damages againt Judge.*

Under an Order in Council, dated 4th of February, 1869, the Consular Court of Madagascar was vested with plenary civil jurisdiction over all British subjects within its limits, though it was not created in the sense of English law a Court of Record :—

Held, that the appellant, whilst sitting and acting as a judge of the Consular Court, was entitled to the same degree of protection which is accorded by the law of England to the judge of a Court of Record; and that an action for damages did not lie against him for dismissing without proof an action which he held to be vexatious; for however inadequate his reasons for such holding might be, such dismissal was within his jurisdiction.

Lawrance v. *Norreys* (15 App. Cas. 210) approved.

APPEAL from a decree of the Supreme Court (Dec. 11, 1888) in favour of the respondents for Rs.200 and costs.

The circumstances of the case and the proceedings complained of appear in the judgment of their Lordships.

Sir *R. Webster*, A.G., and *Sutton*, for the appellant, contended that he had jurisdiction in the matter of the suit of *Pélicier Frères* v. *Mairs*, and that he had acted therein within the scope of his authority, in a judicial capacity, and in good faith. Accordingly, he is not liable to an action for an erroneous judgment. The judge of the Consular Court had, under the Order in Council of the 4th of February, 1869, framed under 6 & 7 Vict. c. 94, full civil jurisdiction, and had the same immunities as a Court of Record in England—that is, he is free from liability whilst acting judicially within his jurisdiction without malice. Reference was made to sects. 8 and 13 of the Order, and to *Calder*

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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v. *Halket* (1); *Scott* v. *Stansfield* (2), which was an action of slander against a county court judge; *Munster* v. *Lamb* (3); *Willis* v. *Maclachlan* (4); *Hamond* v. *Howell* (5); *Garnett* v. *Ferrand* (6); *Dawkins* v. *Lord Rokeby* (7). In *Mostyn* v. *Fabrigas* (8), Lord Mansfield pointed out that there was no distinction between Courts of Record and Courts not of record in foreign parts.

The respondents did not appear.

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The judgment of their Lordships was delivered by

LORD WATSON:—

The appellant was, in the year 1887, British Consul for Madagascar, in which capacity he was the Chief Judge of Her Majesty's Consular Courts in that island.

On the 9th of May, 1887, the respondents, Pélicier Frères, took out a summons against one Louis Mairs, upon whom it was duly served on the 12th of the same month. The summons required the defendant to attend the Court personally, or by an agent, on the 15th of August, at 2 P.M., and prayed judgment for the sum of thirty-five dollars, being the price of ten bags of Indian rice sold and delivered to him by the respondents, with interest and costs.

On the day and at the hour specified in the writ, both parties appeared in Court before the appellant, at Tamatave, the respondents being represented by their attorney, Mr. Elie, and the defendant Mairs by his employer, Mr. Proctor. In presence of the parties, the appellant stated that he had private information that the debt sued for had been paid and a receipt granted by the respondents. At that moment Mr. Proctor produced the receipt and handed it to the appellant, who then went on to say that he considered the case to be a vexatious one, and that he would dismiss it on that ground. The respondents'

(1) 3 Moo. P. C. 28.
(2) Law Rep. 3 Ex. 220.
(3) 11 Q. B. D. 606.
(4) 1 Ex. D. 382.
(5) 2 Leach, Mod. Ca. No. 130, at p. 219.
(6) 6 B. & C. 611.
(7) Law Rep. 8 Q. B. 262; Law Rep. 7 H. L. 744.
(8) 1 Sm. L. C. 9th ed. p. 644.

attorney admitted that the receipt had been signed by them, but explained that it had been obtained by fraud; whereupon the appellant continued the case until Thursday, the 25th of August.

With the view of establishing their assertion, that the receipt had not been legitimately obtained by the defendant Mairs, the respondents, between the 15th and the 25th of August, made application to the appellant for a summons citing the defendant, who resided about 100 miles from Tamatave, to appear personally and give evidence; but the application was refused. The respondents then offered to make affidavit, explaining the necessity for examining the defendant, and that the sum necessary to cover his travelling expenses would be tendered; but the appellant persisted in his refusal, on the ground that the case was a vexatious one, and that the citation of the defendant would cause unnecessary injury to his employer's business.

The cause came before the Court again upon the 25th of August, the day to which it stood adjourned. It is nowhere averred, nor does it appear, that on the 25th of August the respondents produced or tendered any evidence, oral or documentary; and the appellant, adhering to the opinion previously expressed by him and without further hearing, gave judgment for the defendant, with costs.

On the 7th of October, 1887, the respondents filed a declaration against the appellant in the Supreme Court of Mauritius, praying the Court to condemn him in payment to them as damages of the sum of Rs.1200, with costs of suit.

The declaration sets forth the facts already stated, which are substantially corroborated by the record of the proceedings in the Consular Court, authenticated by the subscription of the appellant, and also by the evidence of the appellant himself, and of Joseph Pélicier jeune, a partner of the respondent firm, which was taken de bene esse in the course of the proceedings. The order of the Consular Court of the 15th of August, 1887, bears that:—

"Mr. Proctor, who appeared for Mr. Mairs in the position of his employer, produced the receipt for the sum claimed, signed by Pélicier Frères and acknowledged by Mr. Pélicier.

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"Under these circumstances, the Court is of opinion that the claim is a vexatious one.

"Mr. Elie alleges that the receipt was obtained by fraud, and, under the circumstances, the Court adjourned the case until Thursday, August 25."

The order of the Consular Court, on the 25th of August, giving judgment for the defendant, with costs, bears that:—

"The Court was of the opinion that the case should be dismissed forthwith, without further hearing.

"A receipt for the sum claimed having been produced, which was acknowledged to be for the special sum claimed."

Besides giving a narrative of the facts, the declaration stated as follows:—

"Whereas the aforesaid acts of the said defendant constituted a flagrant abuse of the judicial powers vested in him as Her Majesty's Consul, and a denial of justice on his part."

After the appellant's defence was lodged, parties were heard upon a preliminary plea taken by him, to the effect that the Supreme Court of Mauritius was not competent to take cognizance of the case, because (1.) that Court, as to civil suits arising in Madagascar, only possessed an original jurisdiction concurrent with that of the consular judge; (2.) it had no authority to entertain a suit for acts done by the consul in his judicial capacity; and (3.) it could not, in any form of process, review his decisions in the suit between the respondents and Louis Mairs, inasmuch as the sum sued for was below appealable value.

After hearing argument, Sir E. J. Leclezio, Chief Judge of the Supreme Court, and His Honour F. C. Williams, one of his puisnes, delivered their judgment on the 29th of May, 1888. They rejected the appellant's plea in so far as it struck at their jurisdiction to entertain the suit. With regard to that part of the plea which related to the immunity of the appellant for acts done by him in his judicial capacity, they came to the conclusion—

"That the common law of privilege accorded to English Judges of Courts of Record may be held to follow them to a Consular Court of Record, where English law is administered."

And they gave leave to both parties, if they so desired, to amend their pleadings in the light of that decision.

Both parties availed themselves of the leave thus given. The respondents struck out of their declaration the averment, already quoted, as to the "flagrant abuse" of the appellant's judicial powers, and substituted an allegation in these terms:—

"Whereas, by refusing as he did, under the circumstances aforesaid, to allow the plaintiffs to prove their case, and to summon the said Mairs as a witness for that purpose, the said defendant exceeded the jurisdiction vested in him by the Order in Council of 14th (sic) February, 1869, or, in other words, acted beyond the limits of his authority, and actually abused such authority."

The appellant, in order to meet the respondents' amendment, deleted one of his pleas on the merits, substituting for it these words:—

"That the defendant acted as a consular judge within his jurisdiction and within the limits of his authority, and did not abuse the authority vested in him, and that he is not liable to action in respect of the judicial acts complained of, which were within the scope of his said jurisdiction."

The respondents did not appear at the hearing of this appeal; and in these circumstances their Lordships thought it right to hear the appellant's counsel in support of the judgment of the Court below, with respect to the privilege attaching to his office as judge of the Consular Court. After hearing argument, their lordships are satisfied that, in the year 1887, the Consular Court of Madagascar was not, in the sense of English law, a Court of Record, and that it did not become so before the date of the Africa Order in Council, 1889. But in 1887 the Court, under an Order in Council dated the 4th of February, 1869, exercised jurisdiction of a very important character. Established by the Queen in virtue of power derived from a treaty with the Sovereign of Madagascar, it was the only British tribunal in the island, and was vested with plenary civil jurisdiction over all British subjects within its limits. The Supreme Court of Mauritius had only a concurrent original jurisdiction, with authority to review the decisions of the Consular Court, upon an appeal duly taken, in causes exceeding Rs.200 in value. In these circumstances, it does not appear to their Lordships to admit of doubt that the

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appellant, whilst sitting and acting as judge of the Consular Court, was entitled to the same degree of protection which is accorded by the law of England to the judge of a Court of Record. In *Kemp v. Neville* (1), Erle, C.J., delivering the unanimous judgment of the Court of Common Pleas, reviewed the authorities bearing on the point, and stated their result as follows:—

"The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained."

In *Hamilton* v. *Anderson* (2), Lord Cranworth laid down the same doctrine, with this not unimportant addition:—

"I need hardly say that the merely adding that it was done maliciously amounts to nothing at all. That would, in the opinion of the aggrieved party, be always true, or at all events would be what he would be perfectly able to state."

Their Lordships do not think that the declaration, as originally framed, discloses any cause of action against the appellant. The Court below was evidently of the same opinion, and on that account allowed an opportunity of amendment. The only case presented in the declaration was, that the acts of which the respondents complain constituted a flagrant abuse of the judicial powers vested in the appellant—an allegation which implies that, although flagrantly wrong, they were the acts of a judge exercising proper judicial functions.

The amendment discloses an entirely new ground of action, namely, that the acts complained of were done by the appellant in excess of the jurisdiction vested in him by the Order in Council of 1869; or, in other words, that he was acting beyond the limits of his judicial authority. Now, a judge may commit an excess of his jurisdiction in many ways; but the kind of excess which the respondents impute to the appellant is, in their Lordships' opinion, obvious. He was admittedly sitting in Court as judge in an action which he was competent to try; both parties to the suit were before him, and the acts complained

(1) 10 C. B. (N.S.) 549. (2) 3 Macq. 378.

of related to the cause before him, and were embodied in formal orders of the Court authenticated by his signature. In that admitted state of the facts, their Lordships are unable to attribute to the respondents' averments any other meaning than this, that the appellant, although he was sitting to try the case in presence of the parties, and was competent to try and decide it, had nevertheless no jurisdiction at that stage of his proceedings to dismiss the suit as a vexatious one.

After amendment of the pleadings, the present case was argued on its merits before a Court composed of the same learned judges who had disposed of the appellant's preliminary pleas. Their Honours delivered their judgment on the 11th of December, 1888, from the tenor of which it plainly appears that they, as well as the respondents themselves, put the same construction upon the amended declaration which their Lordships have done. Their Honours said:—

"That this decision to reject a plaint without having evidence or argument in support of it was the assumption of a power to decide a case without hearing it, which power the defendant did not possess, was the argument submitted to us by counsel for the plaintiffs; and we have come to the conclusion that the plaintiffs are entitled to a verdict."

They accordingly gave decree against the appellant for Rs.200 with costs of suit. They plainly meant to affirm the legal proposition maintained by the respondents' counsel, because they expressly say:—

"It must be understood that we do not find the defendant liable for any act or thing done within the scope and limits of his judicial discretion."

If, according to law, it was, as the learned judges have held, beyond the scope and limits of the judicial discretion of a judge in the position of the appellant to refuse the plaintiff a proof, and to dismiss his action as vexatious, their decree or verdict might be unassailable. But the proposition which they have affirmed, and which lies at the very foundation of their judgment, appears to be founded upon a misapprehension of the law.

Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process,

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by staying or dismissing, without proof, actions which it holds to be vexatious. In *Metropolitan Bank* v. *Pooley* (1), the Lord Chancellor (the Earl of Selborne), speaking with reference to the dismissal of an action on that ground, said that—

"The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure."

The same principle was again laid down by the House of Lords in *Lawrance* v. *Norreys* (2). In that case the Appeal Court had refused to allow proof, and dismissed the action, and Lord Herschell observed (3):—

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases."

In the remarks made by Lord Herschell, as to the caution with which the power of summary dismissal on such grounds ought to be exercised, their Lordships unhesitatingly concur. It is, in their opinion, matter of regret that the appellant should have acted so hastily, instead of permitting the respondents to adduce proof of their assertion that their receipt had been fraudulently obtained by the defendant Mairs. But the insufficiency, or even the utter inadequacy of his reasons for dismissing the suit, cannot affect his jurisdiction to dismiss it. He was competent to entertain the question whether the suit ought to be dismissed as vexatious, and equally competent to decide that question one way or another. It is due to the appellant to state that the respondents in their pleadings make no imputation of dishonesty, although their Lordships do not mean to suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a judge in his position. The remedy, when such a case does occur, does not lie in an action of damages against the offending judge, but by making a representation to the authorities whose duty it is to see that justice is administered with due care and attention.

(1) 10 App. Cas. 214. (2) 15 App. Cas. 210.
(3) 15 App. Cas. 219.

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For these reasons, their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the suit with costs. The respondents must pay to the appellant his costs of this appeal.

Solicitor for the appellant: *Solicitor to the Treasury.*

[PRIVY COUNCIL.]

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SCEBERRAS TRIGONA . . . . . PLAINTIFF;

AND

SCEBERRAS D'AMICO (NOW McKEAN) . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

Law of Malta—Construction—Primogenitura—Presumption that prescribed Order of Succession is "regular."

Held, with regard to a primogenitura, created in 1702, of certain lands in Malta, that the presumption of Maltese law was in favour of its being "regular," so as in each line of descent to admit female in default of male issue of the last holder in that line, in preference to male collaterals descended from a common ancestor; and that the natural construction of the deed was to the same effect.

D'Amico v. *Trigona* (13 App. Cas. 806) followed.

APPEAL from a decree of the Court of Appeal (Nov. 10, 1886), affirming a decree of the First Hall (Jan. 5, 1886), which dismissed the appellant's suit.

The question at issue was as to the succession to an estate in Malta under a primogenitura created by a marriage settlement dated August 26, 1702. By his petition, dated July 9, 1883, the appellant claimed to succeed, owing to the death of the respondent's father without male issue, on the ground that in the line of the last holder, to which the respondent belonged, no male existed, and that he was the male next of kin to the person last seised, although in a collateral line.

* *Present*:—THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

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The deed of 1702 is sufficiently set out in the judgment of their Lordships.

Sir *H. Davey*, Q.C., and Dr. *Alfred Mattei*, for the appellant, contended that his claim was in accordance with the true construction of the deed, which created a masculine though not an agnatic primogenitura. By clause 1 of the deed (which, together with part of clause 2, is set out in the judgment), illustrated and explained by the subsequent clauses, a primogenitura in a male line in the strict sense of that term was constituted. It was to be held by the male sons of the founder and their respective male descendants, "unus post alium servato gradu primogenituræ." In default of such male line it would go to a female, and the line of males from males from such female. The succession in such new line would be governed by the same rules as governed the male line of males from males. In default of all descendants of the founder, there was a remainder over to the grantors if alive, or, in case of their death, to the next of kin of the founder. Reference was made to *D'Amico* v. *Trigona* (1). [LORD SELBORNE: In that case the different lines from the sons were distinguished in the deed. Here you say that should be done by implication.] The authorities illustrate the special construction sought to be put upon this deed: see Torre, De successione in primogenituris et majoratibus Italiæ, pars i. pp. 79, 6, No. 47, p. 245, No. 53, p. 26, p. 13, No. 30, p. 25, No. 11. And see Carl Antonio de Luca, De Lineâ legali, p. 155, No. 46, as to the true meaning of the "ordo primogenituræ." Then as to the "filius primogenitus domini sponsi," including all the sons of the first donee with their respective lines as each becomes eldest surviving son on failure of lines of elder brothers, see Torre, pars i. p. 5, Nos. 29, 37, pp. 27, 28, p. 80, No. 15, p. 535, pars ii. pp. 286, 287; De Luca, p. 149. Then as to succession being by male lineal descent not including females, see De Luca, De Lineâ legali, p. 249, art. xx. No. 27; Torre, pars iii. p. 30, No. 5; pars i. pp. 6, 158, 422, 144, 33; De Luca, p. 173, art. viii. No. 2, p. 61, No. 10, p. 7, No. 29, p. 174, No. 11; Molina De Hispani primogenituris, liii. No. 55, p. 375, No. 30, p. 389, No. 29. As to the extent to

(1) 13 App. Cas. 806.

which females are excluded, see Torre, pars. i. p. 400, No. 174, p. 145, No. 145; Molina, p. 41, No. 28, p. 29, No. 20, p. 41, No. 28. Reference was also made to Torre, pars i. p. 761, No. 39, p. 579, No. 17, p. 6, No. 48, p. 148, Nos. 184, 185, 186; pars iii. p. 30, No. 4.

Rigby, Q.C., *Fullarton*, Q.C., and *Paul Strickland*, for the respondent, were not heard.

The judgment of their Lordships was delivered by the

EARL OF SELBORNE:—

The question raised by this appeal is one of the construction of an entail or primogenitura of certain lands in Malta, which two Courts and four judges have agreed in construing to be "regular," so as, in each line of descent, to admit female in default of male issue of the last holder in that line, in preference to male collaterals descended from a common ancestor. As to the general rules and principles of law which regulate the course of succession to such a primogenitura, the authorities appear to their Lordships to be agreed. Torre (cited by the appellant) says that "each son, with his descendants in order of primogeniture, makes a distinct line;" and again, that he who is first called to the succession is "tanquam stirps et caput primogenituræ designatæ, et successive ejus filii et descendentes ordine primogeniali, eaque linea extincta, secundogenitus cum sua linea, eodem ordine primogeniali" (pars i. p. 26, and p. 80, No. 15). Carl Antonio de Luca, another of the appellant's authorities, says: "Filius primogenitus efficit primum caput in linea descendentium, et filius secundogenitus secundum, ac tertius tertium, et hoc ordine ad majoratus successionem admittuntur: et filius secundogenitus nunquam dicitur primogenitus dum aliquis filius aut descendens a primogenito superest" (p. 155, No. 46). Or, as the law is stated in the judgment of the Court of Appeal, line is first to be considered, then degree; and among several competitors in the same line, the male is to be preferred, unless the founder of the primogenitura has otherwise disposed; every holder of the primogenitura forms a line which includes all his male and female

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descendants, to the exclusion of his brothers, sisters, or other collaterals; and, consequently, a brother who, as a male, claims to succeed in preference to the daughter of the deceased last holder, is bound to shew, "in such a way as to remove all reasonable doubt," that such was the will of the founder. The founder might, if he pleased, establish a special order of succession deviating from this "regular" order; but the presumption of Maltese law, when a contrary intention is not reasonably clear, is in favour of the regular order.

It was argued, on behalf of the appellant, that an intention on the part of the founders of this primogenitura to deviate from the regular order, so as to give male collaterals of a younger line the preference over daughters of any holder in an elder line dying without male issue, is sufficiently made out. Their Lordships, after fully considering the argument addressed to them, are unable to accept that conclusion. They think the natural construction of the written instrument in this case, even if it were not aided by the ordinary presumption of law, would be in the respondent's favour.

Under the Notarial Act of 26th of August, 1702 (which created this primogenitura, upon the occasion of the marriage of Salvatore Dorell and Teresa Falzon Navarra, from whom both parties to the present contest are descended), the husband, Salvatore, took the lands in question for his life. The material words, providing for the succession after his death, are these:—

"Et post ejus obitum succedat et succedere debeat .... filius primogenitus ipsius domini sponsi, et post mortem dicti filii primogeniti ejusdem filius primogenitus, nepos, pronepos primogenitus, aliique descendentes primogeniti, unus post alium, de primogenito in primogenitum, servato semper gradu primogenituræ in perpetuum et perpetuis temporibus; ita ut, durante hac linea masculina dicti filii primogeniti dicti domini sponsi de primogenito in primogenitum, ille qui primogenitus erit succedat, et primogenitus intelligatur etiam si unus esset; ita quod, si ex primogenito masculo, vel primogenitis masculis, non superessent filii masculi, eo in casu ad primogenituram prædictam censeatur et sit vocata fœmina primogenita," &c.

It is not necessary to say more of the rest of the deed, than

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that the succession which it establishes from a female holder of the primogenitura is beyond question regular; and that it provides for the event of a total failure of all issue descended from Salvatore and Teresa, in which case the primogenitura would come to an end.

It was admitted that the earlier words down to "perpetuis temporibus" (if not controlled by any subsequent context), would have created a primogenitura of the regular kind; but it was said that the effect of the next words, "ita ut, durante hac linea masculina," &c., is to place upon those which came before "filius primogenitus, nepos, pronepos primogenitus, aliique descendentes primogeniti," &c., a strictly masculine interpretation; as was held by this tribunal in the case of *D'Amico* v. *Trigona* (1). Their Lordships, for the present purpose, assume that this would be so. But this does not determine what the male line is, which must fail before any female can be called to the succession. The argument for the appellant seems to depend upon the assumption that, for this purpose, all males descended through males from Salvatore and Teresa ought to be reckoned as one line. That assumption appears to their Lordships to be at variance with the general rules and principles applicable to questions of this kind, to which reference has been made, and opposed to the natural sense of the express words. The context, both that which precedes and that which follows, describes, not a line of which Salvatore is the stirps or caput, but one derived from his filius primogenitus—"ejusdem filius," &c.; and "hac linea masculina dicti filii primogeniti dicti domini sponsi." On failure of males of that line, the female issue of the last holder are called to the succession, in preference to his brothers, or male issue of brothers. The words "vel primogenitis masculis" (superadded to "ex primogenito masculo") are quite capable of the meaning, that the same course of succession is to take place toties quoties, in every line of descent; and their Lordships so understand them. If there had been two sons of Salvatore and Teresa, and the eldest, succeeding after his father's death to the primogenitura, and dying without male issue, had left a daughter, that daughter, according to the natural meaning of the words, would have been

(1) 13 App. Cas. 806.

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expressly called to the succession; as is rightly said by the Court of Appeal. The division of lines did not, in fact, take place till several generations afterwards; but it does not appear to their Lordships to admit of doubt, that the same course and rule of succession was intended to be observed throughout. Their Lordships agree with the learned Judge in the Court of First Instance, that the condition, "si non superessent filii masculi," does not refer to the "exhaustion of all males in the collateral and habitual lines, but rather to the deficiency of males nearest in degree to the actual first-born male holder."

The appellant's contention, that the words "ita ut durante hac linea masculina," ought not to be referred to the line of the eldest-born son, but must receive a wider application, was founded upon the supposed necessity of such a wider construction, in order to admit the lines which might descend from younger sons, in their proper order, to the succession. Their Lordships do not doubt that those younger lines would be entitled to succeed, in their proper order, under this primogenitura. They assume that the words "servato semper gradu primogenituræ in perpetuum et perpetuis temporibus," and "servato tamen in his quam cæteris supra expressis semper ordine primogenituræ," are equivalent to the clause, "semper gradu et prærogativa servata," of which Carl Antonio de Luca says (p. 249, art. xx., No. 27), that it "necessario supponit fidei-commissum reciprocum inter lineas ut scilicet post unam alia vocetur." If more than this were necessary, the plural words "vel primogenitis masculis," superadded to the singular in the context which introduces the gift to a female, and the ultimate provisions contained in this instrument for the case of a total failure of all issue descended from Salvatore and Teresa, would be enough to prove that the founders of the primogenitura so intended. But it does not follow that words which speak of the particular line which stands first in the whole course of succession ought to be interpreted in any other than their natural sense. Full effect may be given to the intention in favour of younger lines, whether implied from the nature of a primogenitura of this kind, from the general scheme or particular provisions of the instrument, or from the technical significance of some of its phrases, without imposing upon plain words

a sense which they do not naturally bear, and which is not favoured by the general presumption of the law governing the case.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

Solicitors for the appellant: *Leathley & Willes.*
Solicitors for the respondent: *Witham, Lambert, & Roskell.*

[PRIVY COUNCIL.]

MCARTHUR & Co. . . . . DEFENDANTS;

AND

CORNWALL AND ANOTHER . . . . . PLAINTIFFS.

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Pacific Islanders Protection Acts, 1872, 1875—*Order in Council, August* 13, 1877—*Jurisdiction of High Commissioner's Court—Suit relating to Land in Samoa—Measure of Damages for Trespass.*

By an Order in Council of the 13th of August, 1877, issued under the Pacific Islanders Protection Acts, 1872 to 1875, and the Foreign Jurisdiction Acts, 1843 to 1875, a High Commissioner's Court was established which by sect. 6 of the Order applied to "all British subjects for the time being within the Western Pacific Islands, whether resident there or not." By treaty between Her Majesty and the King of Samoa, dated the 28th of August, 1879, it was provided that civil suits in Samoa should be tried by the High Commissioner.

In a suit in that Court for the recovery of land in Samoa, and for damages for conversion of its produce, it appeared that the defendants did not dwell within the bounds of the said islands, but that they had a store in Samoa, affixed to which was a signboard with the name of their firm, where they carried on business by servants and agents:—

Held, that by the true construction of the above Acts, Order, and treaty, the defendants were within the jurisdiction of the Court, and that the latter was competent to grant the relief prayed:

Held, further, that the measure of damages was the value of the produce

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* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management. However wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiff.

CONSOLIDATED appeals from a decree of the Supreme Court (March 13, 1890) by the defendants so far as it affirmed a decree of Her Majesty's High Commissioner's Court for the Western Pacific at Samoa (May 25, 1889), and by the plaintiffs so far as it directed a new trial as to damages.

The facts of the case and the proceedings in the suit are set out in the judgment of their Lordships.

The opinion of the Chief Justice with regard to the question of jurisdiction was as follows. In reference to the treaty of 1879, particularly art. 5 thereof, he says: "In my opinion, the King and Government, or, in other words, the 'authorities' of Samoa, are by this article stripped of their judicial power over such lands as are possessed by British subjects in Samoa, and such power is vested in the High Commissioner for the Western Pacific as 'the officer duly authorized' in that behalf. I think that this is the effect of the treaty between Her Majesty and the King and Government of Samoa, and that what has been done in this respect has been done with the intention and the direct view of attaining the objects of that treaty.

"Holding this view, then, I am of opinion that this action was cognizable by the Court below, for by the Western Pacific Order in Council, 1877, the High Commissioner's Court for the Western Pacific is duly authorized to exercise 'all Her Majesty's jurisdiction' exerciseable in the Western Pacific in civil matters (art. 17), and the whole jurisdiction of the Court may, subject to the Order in Council, be exercised by the High Commissioner (art. 18), or by a Deputy Commissioner in respect of the particular district to which he is appointed (art. 19); and by the Order in Council, 1877, constituting the Court, 'proceedings by action relating to land or other property,' and 'for recovery of damages,' or otherwise concerning any civil right or other matter of a civil nature at issue, are authorized to be taken in the High Commissioner's Court.

"It was contended at the bar that so much of the Order in Council as authorized proceedings relative to land to be taken was ultra vires, and not warranted by the Pacific Islanders Protection Acts, under which it was agreed the Order in Council was framed. I do not, however, concur in that view. First, because it is erroneous to say that the Order in Council is framed under the authority of the Pacific Islanders Protection Acts alone. The preamble to Order in Council of 1877 shews that the Order was framed and passed by virtue and in exercise of the powers in this behalf by the Pacific Islanders Protection Acts, 1872 and 1875, and by the Foreign Jurisdiction Acts, 1843 to 1875, or otherwise in Her Majesty vested. And secondly, because, by the Foreign Jurisdiction Acts, Her Majesty may exercise any powers or jurisdiction which Her Majesty now hath, 'or may hereafter have,' within any country out of Her Majesty's dominions in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory; and I am of opinion that full jurisdiction over all civil matters, of whatever nature, at issue between British subjects in Samoa, has been conferred by the King and Government of Samoa on the High Commissioner's Court under art. 5 of the treaty of 1879. I am of opinion, therefore, that the Deputy Commissioner had jurisdiction to entertain this action, and that, unless it can be otherwise impeached, his judgment must stand. If this judgment stands, the Court below will, on further application made, take all such proceedings as are within its jurisdiction in order to give effect to its order for possession: *Pitts* v. *Lafontaine*. (1)"

Mark Napier, Campbell of the New Zealand Bar, and *McArthur*, for the appellants:—

The High Commissioner's Court had no jurisdiction to entertain this action, being one for trespass to lands in Samoa. Reference was made to the Western Pacific Order in Council, 1877, and to 38 & 39 Vict. c. 51, s. 6; and it was contended generally that suits relating to land did not fall within the jurisdiction thereby created. If a general jurisdiction to entertain

(1) 5 App. Cas. 581.

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actions of this kind was possessed by the Court, it only existed by virtue of the treaty of 1879, and in favour of British subjects in possession of land purchased from Samoans prior to the treaty. In this case there was no evidence of such purchase. According to that evidence the lands in suit became vested in the respondent, Manaema, a native of Samoa, in February, 1879, and were not subsequently divested. If, on the other hand, there is a general jurisdiction to entertain suits of this character, still it should be shewn that the plaintiff was resident within the jurisdiction at the time the writ was issued; and secondly, that the defendants, or one of them, were so resident at the time the cause of action accrued. Neither is the case here. With regard to damages, they ought to be assessed on such a principle as would compensate the plaintiffs in respect of their dispossession, and no further. The Chief Justice has treated the appellants as in contempt of his Court, and has allowed a consideration of such contempt to affect his ruling as to damages. The First Court did so to a still greater extent. No such contempt was either alleged or proved; nor was any case made for penal damages.

Fullarton, Q.C., *Lynch*, and *Hohler*, for the respondents:—

On the true construction of the Acts and Order in Council referred to on the other side, the Court has jurisdiction to entertain this suit, and to make the decree appealed from. The reasons given by the Chief Justice are adequate and correct. This is a cross-appeal from the order directing a new trial. There was evidence shewing that the Court could reasonably find that the damages suffered equalled the amount decreed. Vindictive damages may be given in a proper case, and were justified in this: see *Merest* v. *Harvey* (1); *Emblen* v. *Myers* (2); *Livingstone* v. *Rawyards Coal Company* (3); *Holmes* v. *Wilson* (4); *Martin* v. *Porter* (5); *Trotter* v. *Maclean* (6). See also the cases collected in Mayne on Damages (4th ed. p. 414), and *Goodtitle* v. *Tombs* (7).

(1) 5 Taunt. 442.
(2) 30 L. J. (Ex.) 71.
(3) 5 App. Cas. 35.
(4) 10 A. & E. 503.
(5) 5 M. & W. 351, 354.
(6) 13 Ch. D. 574.
(7) 3 Wils. 121.

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Napier, replied, asking that their Lordships would assess the damages finally, even though on a liberal scale, so as to end the litigation. Reference was made to *Raja Burdakanth Roy* v. *Aluk Munjooree Dasiah* (1).

The judgment of their Lordships was delivered by

Lord Hobhouse:—

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The suit in which these appeals are presented was brought in January, 1887, by Frank Cornwall and Manaema against the defendants in their partnership name of McArthur & Co. Cornwall is a British subject, and is described as a planter and trader of Samoa. Manaema, a native of Samoa, is the wife of Cornwall, or has lived with him as such. The defendants are British subjects carrying on business in Samoa as traders and planters. The suit was brought in the High Commissioner's Court for the Western Pacific. The wrongs alleged are, first, that on the 27th of March, 1882, the defendants dispossessed the plaintiffs of lands in Samoa, which were specified in Schedule A, and have since that time taken the produce and have neglected or injured the land; and secondly, that on the same day the defendants dispossessed Cornwall of other lands in Samoa which are specified in Schedule B, and have since that time taken the produce. The relief prayed is, first (as to both plaintiffs and as to Schedule A), £30,000 damages for conversion of the produce, and £20,000 for injury to the land; and secondly (as to Cornwall and as to Schedule B), £10,000 damages for conversion of the produce, and recovery of the land.

The defendants filed statements of defence in the months of March and April, 1889. The effect of these statements is to deny the title of the plaintiffs and to allege the lawful ownership and possession of the defendants. They set up a title under the bankruptcy of Cornwall and a sale to them by his trustee in the year 1888; but that title is not now relied on. As regards Manaema, they plead that she had previously brought an action in the High Commissioner's Court in respect of the same matters for which she now sues; that the Supreme Court of Fiji,

(1) 4 Moo. Ind. App. 321, 338.

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sitting in Appeal, made a decree dated the 25th of September, 1886, awarding her £50 damages and her costs, and that she cannot recover anything further.

The action was tried in April and May, 1889, before the Deputy Commissioner, Mr. De Coëtlogon, sitting with two assessors, of whom one retired during the trial on account of ill-health; and on the 25th of May, 1889, the Court pronounced a decree declaring that the plaintiffs were entitled to recover the sum of £41,276 for damages, and the costs of suit, and that Cornwall was entitled to recover possession of the lands in Schedule B, and ordering accordingly.

The defendants appealed to the Supreme Court of Fiji, which, by a decree dated the 13th of March, 1890, affirmed the decree below so far as it declared Cornwall entitled to recover possession of the lands in Schedule B; but in other respects reversed it, adjudging that Manaema was not entitled to any damages, and that as between Cornwall and the defendants there must be a new trial on the question of damages.

Both sides now appeal from the decree of the Supreme Court of Fiji, the plaintiffs contending that the decree of May, 1889, is right and should be restored; and the defendants contending that the action should be wholly dismissed for want of jurisdiction in the Court, and (as regards Schedule A) for want of proof that Cornwall had possession at the time of the alleged trespass, and (as regards Schedule B) for want of proof that Cornwall ever had any title to the lands, or that the defendants had ever entered upon them.

As regards the possession and ownership of Cornwall and the possession of the defendants, it may be at once stated that their present pleas are in contradiction to their previous contentions and conduct, and to the facts established in evidence; and that it is difficult to understand why such pleas were put upon record. Mr. Napier has hardly endeavoured to support them at the bar, though they appear to have been seriously contested in the Court below. The questions for their Lordships to decide are: first, whether there is ground for any decree against the defendants; and, secondly, if there is, whether the decree of the High Commissioner's Court can be maintained. If there must be a decree,

and the decree of the 25th of May, 1889, cannot stand, the Chief Justice of Fiji is clearly right in directing a new trial.

As regards procedure and the jurisdiction of Her Majesty in Council, the case stands in a singular position. In May, 1889, the ordinary course of appeal from the High Commissioner's Court was first to the Supreme Court of Fiji and then to Her Majesty in Council. But on the 14th of June, 1889, a treaty was made between Her Majesty, the Emperor of Germany and the President of the United States of America, by which it is provided that there shall be established in Samoa a Supreme Court, consisting of one judge, who is to be named by the three signatory powers, or, failing their agreement, by the King of Sweden and Norway; and that his decision upon questions within his jurisdiction shall be final. Upon the organization of the Supreme Court all civil suits concerning real property situate in Samoa, and all rights affecting the same, are to be transferred to its exclusive jurisdiction. Their Lordships have been given to understand that the Supreme Court contemplated by the treaty is in working order; but they have no information as to the time when it was organized so as to take exclusive jurisdiction of all civil suits. The hearing in Fiji, though subsequent to the treaty, has been conducted without any reference to it. But then the ratifications of the treaty were not completed till the 12th of April, 1890. Both parties have conducted this appeal as though the treaty would not affect the case until it had been disposed of by Her Majesty in Council. In some views of the case it would have been necessary for their Lordships to pause until they were better informed as to the organization of the Court, for no provision is made by the treaty for cases under hearing or under appeal. But as they have come to the conclusion that both appeals should be dismissed, and that the existing decree should remain intact, there is nothing in the treaty which, in any state of the facts, can render it incompetent for Her Majesty in Council, acting on the advice of this Board, to pronounce such a decree as that, or which can make such a decree inconvenient or embarrassing to the new Court before which the case, if further prosecuted, must come. And their Lordships have thought it best to deliver reasons for their judgment exactly as they would

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if the case had to go back in the ordinary way to Courts subordinate to Her Majesty in Council. They think that such a course is the most respectful to the Supreme Court of Fiji, and also to the Supreme Court of Samoa, and also the most likely to be of use to the litigant parties. It may also possibly be of some use to the Supreme Court of Samoa, seeing that the litigants are British subjects; that their disputes have hitherto been tried according to English law and procedure; and that the treaty contemplates the use of English procedure until the Supreme Court sees fit to make new arrangements.

The transactions of the parties prior to the present suit are numerous and complicated; but, in the view their Lordships take of the case, it is not necessary to state them in more detail than suffices to exhibit their bearing on the questions of jurisdiction, and of the plea of res judicata in bar to Manaema's claim, and of the principles on which damages should be estimated.

It appears that in the year 1877 and afterwards Cornwall and the defendants were carrying on trade in Samoa. Cornwall was in possession of considerable tracts of land, and the defendants advanced him money to pay his labourers. On the 5th of February, 1879, Cornwall, who then owed the defendants £5664, made a voluntary conveyance to Manaema of the lands comprised in Schedule A; and on the next day he executed a mortgage of other lands to one Nelson, ostensibly to secure a debt of 16,000 dollars, but really without any consideration at all. In the month of August, 1881, the defendants recovered judgment in the High Commissioner's Court against Cornwall for the sum of £5500 then owing by him. Upon this Cornwall left Samoa, as he says, to prosecute an appeal in Fiji against the defendants' judgment; and he did go to Fiji and prosecute his appeal, which was dismissed in January, 1882; but he left Samoa suddenly and clandestinely. He has never returned thither, nor did he prefer any claim in respect of his land till this action was brought.

In the month of November, 1881, the labourers on Cornwall's land, being unpaid, sued Cornwall in the High Commissioner's Court, and obtained a decree for £900, in granting which the

Court made severe remarks on the misconduct of Cornwall in leaving his labourers without supplies or provision for returning home.

Under both these judgments writs of fi. fa. were issued. The goods and chattels of Cornwall were sold, but failed to satisfy the claim of the labourers, to which priority was accorded. Under the judgment obtained by the defendants the lands comprised in Schedules A and B, or large parts of them, were put up to public auction, and were knocked down to the defendants for sums amounting to 8565 dollars. It is not alleged that the defendants paid any of the purchase-money. It is not necessary to go into the details of these execution sales. It has been held by the Courts below, and is not now disputed by the defendants, that they were unauthorized and could not confer any title. The defendants, however, took possession in pursuance of them, and that is the trespass complained of in the present action.

In December, 1885, a document was executed by Cornwall, ostensibly as the attorney of Manaema, purporting to be a lease of the lands in Schedule A to Sinclair and others for a term ending the 8th of December, 1886. And in the month of March, 1886, Manaema and the lessees brought an action for the recovery of the same lands, and for damages amounting to £22,000. The Court of the High Commissioner dismissed the action, on what ground does not appear. But, on appeal, the Supreme Court of Fiji decided that the lessees were entitled to have possession of the lands, and to £50 damages; and that Manaema was entitled to £50 damages. The view of the Chief Justice was that Cornwall's conveyance to Manaema in 1881 was colourable and fraudulent, and that he remained the owner of the land; that Manaema was entitled to damages because she was in actual occupation of a house, and was illegally turned out by the defendants; and that the lease of December, 1885, was executed by Cornwall as principal and passed the property to the lessees for the term of the lease. This decree bears date the 25th of September, 1886.

It appears to their Lordships that, as between Manaema and the defendants, the present action raises precisely the same points as were tried and decided in the action of 1886, and therefore that the Supreme Court of Fiji was quite right in

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holding, on this ground, that Manaema can recover nothing further in the present action.

Of the transactions after the decree of September, 1886, very little need be said. The plaintiffs' writ of summons was issued and their statement of claim filed in June, 1887. The defendants did not file their defence till March, 1889. In the meantime they made an ineffectual attempt to appeal to Her Majesty in Council from the decree of September, 1886. They illegally retained possession of the land against the lessees. In 1887 an attempt made by Sinclair to obtain a writ of possession was refused by the Acting Deputy Commissioner. Some renewals of the lease to Sinclair and others were made. But (Cornwall's bankruptcy being placed out of the question) nothing occurred to alter the position of the parties before the trial, except the persistent refusal of the defendants to recognise the rights established by the suit of 1886.

It has been stated above that the defences resting on the allegations that Cornwall has not any title, and that the defendants have not entered on the lands, are wholly unsubstantial. No defence remains, therefore, except that the High Commissioner's Court had no jurisdiction to entertain the suit. It is contended, first, that the defendants personally do not fall within the jurisdiction; and, secondly, that suits relating to land are not within it.

The Court was created by an Order in Council dated the 13th of August, 1877, and made by virtue of the powers vested in Her Majesty by the Pacific Islanders Protection Acts, 1872 and 1875, and by the Foreign Jurisdiction Acts, 1843 to 1875; and by sect. 6 it is expressed to apply to "all British subjects for the time being within the Western Pacific Islands, whether resident there or not." These words are doubtless intended to cover as wide a class relating to Samoa as is allowed by the words used in the Pacific Islanders Protection Act of 1875, which gives power to the Crown to exercise jurisdiction over its subjects in those parts, and to create a High Commissioner and a Court of Justice. The persons over whom jurisdiction is given are described as "The subjects within any islands and places in the Pacific Ocean, not being within Her Majesty's dominions, nor

within the jurisdiction of any civilized power." There is no doubt that the islands of Samoa, then called the Navigators' Islands, are among the places here mentioned. But it is contended that inasmuch as no one of the partners in the firm of McArthur & Co. has dwelt or is to be found within the bounds of the Islands, they are not "within" them as required by the statute and the Order in Council.

It certainly would be a very startling result if persons who had obtained the possession of lands through the processes of the High Commissioner's Court should be able to retain that possession and to prevent examination into the validity of those processes by alleging the incapacity of the Court to exercise jurisdiction over them. If it were necessary it would have to be considered whether those who set a Court of Justice in motion, and obtain the aid of its decrees and officers, are competent to deny its authority to enforce against them liabilities arising out of their misuse of those decrees and officers. But it is not necessary, because the defendants had a store in Samoa in which they carried on business by servants and agents, and affixed to which was a signboard with the words "Wm. McArthur & Co." in large letters. And their Lordships agree with the Supreme Court, which in the suit of 1886 held that this circumstance clearly brought the defendants within the statute and the Order in Council. Certainly, if it were not so, statutes and orders so framed would fail largely of their intended effect; for it is often the persons who live far off, but take profit from the spot by agents, who are least careful of the rights of those who are on the spot, and who most require the control of local authority.

It is true that the Pacific Islanders Protection Act does not and could not give jurisdiction to Her Majesty over land in Samoa. But the Order in Council is clearly framed to give jurisdiction over British subjects in questions affecting land to the High Commissioner's Court, and must be held to do so in all those places in which Her Majesty has been enabled to give it by the assent of the ruling power. So far as regards Samoa the matter is provided for by a treaty dated the 28th of August, 1879, between Her Majesty and the King and Government of Samoa. In that treaty art. 3 guarantees to British subjects full

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liberty for the free pursuit of commerce, trade, and agriculture, and creates a special tribunal for deciding disputes respecting purchases of land from Samoans. Then art. 5 provides that every civil suit which may be brought in Samoa against any subject of Her Britannic Majesty shall be brought before and shall be tried by Her Britannic Majesty's High Commissioner, or other authorized British officer. This treaty applies itself to the Order in Council of 1877, and appears to their Lordships to be sufficient without any fresh Order in Council to confer on the High Commissioner jurisdiction over such a suit as this.

The result so far is, that though the defendants can plead successfully that Manaema's claims have been disposed of, that plea only leaves them answerable to Cornwall. Against him their pleas fail, and he must be treated, as the decree appealed from treats him, as entitled to recover possession of the lands and damages for dispossession. Then comes the difficult question, what damages? The decree of the High Commissioner's Court, which Cornwall strives to retain, proceeds on the principle of ascertaining the number of cocoanut trees on the land, and assigning an average annual value per tree during seven years of illegal occupation. By this process the sum of £24,676 is brought out as the value of the produce. Then sums, amounting to £9600, are added for depreciation and neglect, and £7000 as "penal damages for illegally holding possession of the lands." These sums make up the total amount decreed, viz., £41,276.

Their Lordships concur with the Chief Justice of Fiji in thinking that such an amount is altogether disproportionate and excessive. The net profit of the estate is put at £3500 a year, or thereabouts. This is the property for the labour on which Cornwall was unable to pay a sum of £900 in the latter part of 1881, which he allowed to pass by an irregular process into the hands of his judgment creditors in 1882, without, apparently, any attempt to get it back, though he might have done so by raising some £6000, less than two years' income at the supposed rate. The method which leads to this result is a very dangerous one. It affords the widest scope for conjectures, which it is impossible to bring to any sure test except by examining actual transactions with the property and its produce, or with other properties in

exactly similar positions. No accounts have been produced nor has any other evidence been tendered on Cornwall's part to shew what profit accrued during his possession. Cornwall himself has kept at a distance from Samoa. The leases to Sinclair and others are at a rent of £50 only, and the sales upon the executions were for small sums, and those upon the bankruptcy for still smaller; but all these transactions were unreal ones, and no reliance can be placed on them. The defendants produced some accounts relating to one of the plantations, which were rejected by the First Court, the reason being, if the Supreme Court of Fiji was rightly informed, that they were mutilated. No doubt there has been great dearth of evidence, and it is the defendants who have been in possession who ought to produce the best evidence, and it is against them that presumptions must be made on points left in doubt. Still, the presumptions must not be so incredible as those adopted by the First Court. It appears to their Lordships, indeed, that, even if the method were right, the evidence does not warrant the conclusions of the First Court as regards either the number or the yield of the trees. The Court seems to have applied to large areas statements made with reference to very small ones favoured by position or by the attention of the cultivator. Notwithstanding some sanguine estimates of value, the impression made upon their Lordships by the whole evidence is that the property is one of very uncertain and fluctuating value, of very little value to one who cannot pay for labour; to one who can, dependent on the supply of labour from time to time; and that, during the period under review, there have been great difficulties in getting the desirable supply of labour. It is probably on this last ground that the Supreme Court of Fiji thought that the defendants ought not to be charged with the large sums awarded by the First Court for deterioration and neglect. The cultivation had gone back from the impossibility or extreme difficulty of getting labour.

The learned Chief Justice says that the safest measure of damage seems to be the value of the produce which the plantations may upon the evidence be taken to have been capable of yielding at the time they were taken possession of. He considers that there is evidence to warrant him in taking that value

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at £1200 a year, and, for the purpose of making an offer to the parties, calculates that a fair sum for damages would be £15,000; this sum being made up of eight years of the value of £1200, without allowing any deduction for expenses, and with the addition of £5400 for penal damages. Cornwall, however, would not accept the reduced sum; and so there was no course left but to direct a new trial. Their Lordships also have tried to bring about a compromise between the parties; but they have not been more successful than the Chief Justice of Fiji.

Their Lordships cannot find any better principle than that of the Chief Justice for the first step in ascertaining the amount of pecuniary damage. But they cannot see why the defendants should not be allowed a proper sum for expenses, nor why they should be fined in a further sum for Cornwall's benefit under the name of penal damages. These consequences are inflicted upon the defendants because, it is said, they have defied British law, and committed a trespass unauthorized and wilful in its inception, and persistent and definite in its continuance. Assuming in Cornwall's favour that such conduct would authorize what is in its nature a fine or penalty, and is not damage to the plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question), their Lordships cannot take so severe a view of the conduct of the defendants.

What was the position of the parties when the trespass was first committed? The defendants were creditors of Cornwall; he was legally bound to pay them to the extent of his whole property; he was especially bound in honour to let them have value out of his plantations because their money had gone to pay for the labour on those plantations. What he did was to execute a fraudulent conveyance to Manaema and a fraudulent mortgage to Nelson; to leave the islands directly a judgment was obtained against him, suddenly, secretly, in violation, as the solicitor in the action states, of his pledged word, and leaving his labourers to shift for themselves in a way which was highly discreditable to himself, and which must have been injurious to the property. When out of the islands he was busy in endeavouring to upset the judgment, apparently a perfectly just

judgment, obtained against him by the defendants. It is not shewn by anything in this record that the seizure and sale of the land effected by the defendants was more than a mistake of law. But even if the defendants did think that they could safely take a short cut to obtain one of their debtor's assets clearly available to make good their debt by some process, there was certainly much in Cornwall's conduct to provoke them to do so; and it is hardly for his sake that they should be visited with penalties greater than the loss which he has suffered.

The conduct of the defendants after the decree of 1886, or at least after their failure to get leave to appeal from it, is less excusable. The illegality of their possession, though disputed before, was then made manifest. It is true that Cornwall has never offered to repay the judgment debt, and that, for aught that appears, the defendants may still be found creditors on an account taken between them, when the profits of the land have been fixed. But that did not justify their retention of the land after a decree for its restoration. To say, however, that for such a piece of disobedience to the law they shall be disentitled to charge their expenses on the land against their receipts from it, and shall be fined into the bargain, and all for the benefit of Cornwall, is going beyond the point warranted by any principle or any decided case known to their Lordships. The defendants have been, at least, very imprudent in the first instance, and afterwards more than imprudent, have been wrongheaded and obstinate. For that they will suffer in at least part of the costs of this expensive and harassing litigation, and in all those reasonable presumptions which will be made against them in questions respecting their receipts and expenses which they ought to clear up and do not.

The nature of the advice which their Lordships will humbly tender to Her Majesty has been before indicated. It is that both appeals should be dismissed, so that the decree will stand affirmed. There will be no costs of these appeals.

Solicitor for the appellants: *F. B. Carritt.*
Solicitor for the respondents: *C. O. Green.*

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[HOUSE OF LORDS.]

H. L. (E.) 1892 *Feb.* 25.

FREDERICK JOHN VINALL . . . . APPELLANT;

AND

ERNEST DE PASS . . . . . RESPONDENT.

Practice—Garnishee Order—Attachment of Debts—Affidavit in support of Application—Information and Belief of Deponent—Allegation of particular Debt being Due—Inquiry as to other Debts—Order XLV. *r.* 1.

In an affidavit in support of an application for a garnishee order under Order XLV. r. 1 of the Rules of the Supreme Court the deponent need not swear positively to the existence of a debt due from the garnishee to the judgment debtor; it is sufficient if he states his information and belief as to the existence of a debt.

In an affidavit in support of an application for a garnishee order the deponent stated his information and belief that a specific debt was due from the garnishee to the judgment debtor. The garnishee in his affidavit denied that he owed that debt, but he declined to deny that he owed any debt:—

Held, that an order for payment was rightly made upon the garnishee.

The decision of the Court of Appeal ([1891] 1 Q. B. 216) affirmed.

APPEAL from an order of the Court of Appeal (1).

The respondent having obtained judgment for £148 9*s.* 6*d.* against the Capital and Industries Corporation Limited obtained a garnishee order "that all debts owing or accruing due" from the garnishee (the present appellant) to the defendant company be attached to answer the judgment, and that the garnishee attend the master in chambers on a day named on an application by the judgment creditor that "the said garnishee pay the debt due from him to the said judgment debtor or so much thereof as may be sufficient to satisfy the judgment." This order was made by the master upon an affidavit by the solicitor to the judgment creditor that he was informed by the managing director of the defendant company and verily believed that the garnishee "is indebted to the defendant company in the sum of £100 and upwards for unpaid calls due in respect of 300 shares held by him in the defendant com-

(1) [1891] 1 Q. B. 216.

pany." In answer to this the garnishee made an affidavit as follows: "I have paid to the Capital and Industries Corporation Limited all sums payable by me in respect of the 300 shares held by me in the corporation save and except such sums as are still uncalled on such shares and which sums I am advised I am not liable to pay until a call is properly made." The master in chambers required the garnishee to make an affidavit that he did not owe any debt at all to the defendant company; but he declined to do so, and the judge in chambers (Vaughan Williams J.) to whom the matter was referred by the master, being of opinion that an affidavit of information and belief on behalf of the judgment creditor was sufficient, and that the garnishee's affidavit was insufficient inasmuch as it ought to have alleged that the garnishee was not indebted to the judgment debtor on any account whatever, made an order that the garnishee do forthwith pay the judgment creditor "the debt due from him to the judgment debtor (or so much thereof as might satisfy the judgment debt)" and that in default execution might issue. The Divisional Court (Day and Lawrance JJ.) rescinded the order upon the ground that the existence of the only debt alleged against the garnishee was negatived in his affidavit and that it was not necessary for him to deny any allegation that was not made against him. The Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) reversed that decision and restored the order of Vaughan Williams J. (1).

Gainsford Bruce Q.C. and *Beddall* for the appellant: —

The decision of the Court of Appeal was erroneous on both grounds. First, the affidavit of the garnishee was sufficient. It distinctly negatived the only debt that was alleged in the affidavit made on behalf of the judgment creditor. A plaintiff must state his case against a defendant fully; a defendant is not bound to deny anything which is not alleged against him. So with a claim against a garnishee; there is no difference in principle. Except the alleged debt for calls which was conclusively denied there is no evidence of any debt, and no defendant or garnishee

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need answer a case that has not been made. The garnishee order no doubt attaches "all debts owing or accruing due" but that only means all debts that exist, and no other debt is suggested than the one negatived. Why then should the garnishee be called on to deny that any other debt exists? It would at least be as reasonable to call upon the judgment creditor to shew or to give evidence that some other debt does exist.

Secondly, an affidavit of information and belief merely is not sufficient to call upon a garnishee for any answer. It may be difficult, and in some cases impossible, for the judgment creditor to swear positively, but that infirmity may exist in an action and a defendant is entitled to rest his defence on the plaintiff's inability to prove his case, though he may have no defence on the merits. This ought to be especially the case in garnishee orders where execution follows at once. Order XLV. r. 1 of the Rules of the Supreme Court contemplates a positive affidavit, not one of information and belief, for it speaks of an affidavit by the garnishee or his solicitor "that any other person is indebted" to the judgment debtor, and the form of affidavit (Chitty's Forms 12th ed. p. 465) is equally positive. The contrary was no doubt decided by a Divisional Court in *Coren* v. *Barne* (1) but that case should be overruled. That is the only decision to be found in the reports and it contradicted the practice for many years at chambers under the Common Law Procedure Act 1854 s. 61. To admit affidavits of information and belief (which are not evidence) leads to much inconvenience and is apt to introduce a dangerous practice. Knight Bruce L.J. is reported to have said that every well-managed firm in Lincoln's Inn had two clerks; an informing clerk and a believing clerk; it was the duty of the informing clerk to be informed of whatever might be to the advantage of the firm's clients, and of the believing clerk to believe it.

[They also referred to *Sparks* v. *Younge* (2) and *Randall* v. *Lithgow* (3).]

Winch Q.C. and *R. M. Bray* for the respondent were not called on.

(1) 22 Q. B. D. 249.
(2) Ir. Rep. 8 C. L. 251.
(3) 12 Q. B. D. 525.

LORD HALSBURY L.C.:—

My Lords, two points have been raised in this case, as to which it seems to me to be quite clear that a sufficient answer has already been given by the Court of Appeal. The first point, which was boldly put forward by Mr. Bruce, was that there was no evidence at all to found these proceedings upon; and the assumption of his argument proceeded upon the theory that everything which is done in a court of justice is done upon the rules of legal evidence which would be applicable to the trial of a cause in Court. No one knows better than a learned lawyer like Mr. Bruce that that proposition cannot be maintained. There are a great number of things which always have been permitted to be done upon what certainly would not satisfy the canon of what is legal evidence when you are dealing with what the Court does in its capacity as a Court administering justice.

There are two cases which I had intended to quote, but I do not think it necessary to do more than to state the effect of them, namely, that where the Court was dealing with interlocutory procedure it very often permitted affidavits to be received pledging the belief and information of the deponents for the purpose (sometimes a very important purpose) of holding persons to special bail. Somewhat more than a hundred years ago the cases to which I refer came before Lord Mansfield and Lord Loughborough (1). They were dealing there with what seems to me to be not altogether an inappropriate region of inquiry, namely the right to hold people to bail, and they pointed out that when you were dealing with such things, in one case dealing with a debt supposed to have been contracted in India, and in the other case where the persons who were suing claimed in a representative character and could have no personal knowledge, it was absolutely essential to the due administration of justice that you should allow people to swear to the best of their information and belief, as otherwise a great many difficulties would arise.

Again, a very familiar example may be taken. Where a

(1) See *Sheldon* v. *Baker*, 1 T. R. 87; and *Hobson* v. *Campbell*, 1 H. Bl. 245.

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perfectly regular judgment has been already recorded, upon an allegation of certain facts the Courts would reopen the judgment and allow the cause to be tried; but it was always necessary in those cases, for the purpose of excluding wanton and frivolous repetitions of litigation, which would only benefit the lawyers in the shape of costs, that the Court should insist upon the parties or some of them swearing what was called an affidavit of merits, stating that they had a good defence on the merits. For that purpose it has been over and over again held that information from a country attorney to a London attorney was sufficient to justify the London attorney in saying that he was informed and believed that his client had a good defence upon the merits.

I give these three illustrations as shewing the mode in which the courts of justice have proceeded. They have not proceeded upon those strict rules of evidence upon which issues of fact are determined, but for the purpose of facilitating procedure and enabling justice to be done with as little cost to the parties as possible they have allowed affidavits founded upon information and belief to be received.

Now, my Lords, it appears to me that the procedure upon which we are at present engaged may be treated in very much the same way. The Courts are now made competent to seize debts (I use phrases which are more compendious in the place of stricter language) as part of an execution, and for the purpose of that it is said that an order as described in the rules may be made, which is to be obtained upon an affidavit that the person against whom the order is directed is indebted to the judgment debtor. The words are "that any other person is indebted." It is obvious that if you were to give effect to those words by requiring that he must be able to swear to such a matter as being one within his own personal cognizance, and to establish the debt upon that affidavit, in not one in a hundred cases certainly would a person be able to swear in the sense that he could swear to a matter within his own personal knowledge. Therefore I do not think that the legislature can have meant it to be necessary that a person should be able to swear upon his own personal knowledge in the sense that he would be

required to do if he were called upon to give evidence in the trial of the cause in which the debt had to be proved.

If I am right as to what the legislature meant, then in the particular case with which we are dealing the exigency of that rule is satisfied by the person having sworn that the garnishee was indebted. But the affidavit unfortunately instead of contenting itself with what the legislature had provided went on to describe what the particular debt was. It may be conceded for the purpose of the argument of Mr. Bruce and of his learned junior that that was wrong, that it was not a debt which could have been established if an issue had been directed. But then what is the attachment made upon? The attachment is of all debts due. It is clear that within the meaning and purpose of the legislature if there were other debts out of which this execution could be satisfied due from the same person, those debts ought to be made the subject of the execution. Now I regard this as not in the least a trial of the existence of that debt; it is not that in any sense; but what it is is a form of procedure by which the person who is alleged to be the debtor can be brought before the Judge, and, if he does not dispute it, an order made that he shall pay. He is equally bound to pay whether the money is due to his original creditor or to this creditor. It makes no difference to him whom he pays; if he owes the money he must pay it. He is brought before the Judge. It has been more than once put to the learned counsel, What is he brought there for? Is it not for the purpose of ascertaining whether he disputes anything or not? If he disputes anything, if he has no goods and no property upon which an execution can properly issue, he is called upon then and there to say so to the Judge, and if he makes the Judge to understand that there is a real dispute upon the subject the Judge will direct an issue and will allow that issue to be tried in due course of law.

My Lords, if that is the true view of the purpose which this machinery, this procedure, was intended to fulfil, let us see what has happened here. Over and over again the appellant has been invited to deny, if he can, that he has this property in his possession (I have already described why I use that compendious

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phrase), and he does not deny it. He says, "I am not called upon to do so—you have to make out that I have this property in my possession; and the thing which you describe as being my property, against which the execution is to issue, I have not got." The reply is, "Well, but the thing which the attachment was upon was all debts or property in your possession. Have you any other?" The answer is, "I decline to say—I do not put it in words. I virtually say I have not." This procedure was for the purpose of giving the judge the judicial power of determining the question whether or not he could safely make an order. It is a fallacy to say that he was called upon to make an order for payment. What he was called upon to do was to determine between the parties what in justice ought to be done; and if the denial of there being other debts due was verified and it was disputed, then undoubtedly the judge would direct an issue.

Now, both before the master and before the Court of Appeal which, I observe, postponed the argument for a week in order to enable the present appellant to make an affidavit, if he thought proper, that he did not owe any other debts and (I am putting it again in my compendious form) that there was no other property in his possession which would satisfy the execution, he deliberately declined to make any such affidavit. What, in good sense, is the inevitable inference? Why, that there are other debts by which he can satisfy this execution. He would rather take the chance of the result of the very learned and ingenious arguments of his counsel, who have addressed to us everything that could be said on behalf of their client, than do the simple thing of saying that he owed no other debts at all.

Under these circumstances it appears to me, my Lords, that the proper result of this case cannot be doubted, and that your Lordships ought to dismiss this appeal with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, after hearing the appellant's counsel I am quite unable to resist the conclusion that this is an appeal absolutely without merits, and I am quite satisfied with the manner in which it has been disposed of by the Lord Chancellor.

LORD MACNAGHTEN :—

My Lords, I quite agree. I think the order for attachment was properly made upon an affidavit grounded on information and belief. I do not see in what other way a conscientious person can depose to matters not within his personal knowledge. On that affidavit the order was made, I think, properly. The order attaches all debts due and owing from the garnishee to the judgment debtor; and in the terms of the rule the garnishee is called upon to say why he should not pay the judgment creditor out of what he owes to the judgment debtor. Then the garnishee in answer says that he does not owe anything to the judgment debtor upon one particular account. More than that he will not say. That was no answer; and as he has declined over and over again to give any other answer, I think the order was right.

LORD FIELD :—

My Lords, I am entirely of the same opinion. As regards the first point, ever since the year 1877 I have been of opinion that an affidavit in the terms, or even not quite fully satisfying the terms, of the one now before your Lordships, was a sufficient compliance with Order XLV., and I am delighted now to find how many excellent reasons there are in support of that opinion.

With regard to the second point, I did for some time entertain a doubt whether or not, if any proceedings were taken by the company against the garnishee in respect of any debt or debts which they alleged existed, he would be able to aver and to make a good plea under rule 7 of Order XLV.; because, as the matter stands, there may be some difficulty in identifying the debt sought to be recovered in any action of that kind with the particular sum levied under this execution; but, upon consideration, I am quite unable to come to the conclusion that there would be any real or substantial difficulty in that matter. I have no doubt whatever that in any proceeding of that kind the appellant would be entitled in some shape or other to get, and would get, credit as against the company for the sum of money which he has paid under this attachment. But even if it

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should be otherwise (I do not think it would be) the case is, I think, entirely met by the observations of the Queen's Bench Division in the case of *Randall* v. *Lithgow* (1). In that case the insurance company had not appeared to contest the debt. They raised afterwards fair grounds for contending that no debt in point of fact, existed at that time; but the Court said ultimately that the insurance company had placed themselves in their present difficulty by allowing the order of the 7th of April 1883 to be made against them by default instead of appearing and shewing cause against it. It seems to me that the present appellant is exactly in that position here. It is true he did appear; it is true he did shew for cause something against the particular debt which is specified in the affidavit. But then he was invited also to shew cause and to say whether there was any other debt of the debts which had been attached by that order which he owed or disputed. Two occasions were solemnly given to him upon which he might have raised any question of that kind; but he declined on both occasions to do so. Therefore I think he has brought himself entirely into the position of the insurance company in *Randall* v. *Lithgow* (1) and he cannot now complain if there should be (which I do not think there will be) any difficulty ultimately in his pleading in the mode I have suggested.

LORD HANNEN:—

My Lords, I am entirely of the same opinion, and I shall add but very few words to those which have fallen from my noble and learned friends who have preceded me.

The first point raised is as to whether or not the affidavit upon which these proceedings were founded is sufficient, it being only of information and belief. I have already said that my experience of the practice has been in conformity with that which has been stated by the noble and learned Lord who last addressed your Lordships. It is to be remembered that he took in hand the settling of these matters immediately after the passing of the Judicature Act, and devoted himself for a considerable time to the determination of the points which would arise. There-

(1) 12 Q. B. D. 525.

fore, there is a particular value belonging to the decisions which he gave at that time, and they were not disputed—at least the decision upon this point was not disputed until a case came in which it was decided in conformity with his view.

It is to be observed that the statute requires that the affidavit should be made by a person who has recovered a judgment or by his solicitor—nobody else. In the nature of things, therefore, those two persons would only, as it were, by accident ever know as a fact of the indebtedness of the proposed garnishee. The statute does not provide for obtaining the evidence of the persons who could prove it in the ordinary sense. In short it is not for the purpose of proof at all—it is no doubt for an inquisitorial purpose—it is to lay a foundation for calling the debtor, the garnishee, before the tribunal in order to ascertain whether he can deny that which is alleged against him, simply that he is indebted.

Now, with regard to the second point as to whether or not the order is sufficient, that the garnishee is to pay the debt due from him without specification or without reference to the particular debt which has been mentioned in the affidavit, it is to be observed that the statute here only requires that the affidavit shall state that he is indebted to such debtor. It does not require and it has been decided that it need not state in what respect he is indebted. Therefore, if all that is required by the statute had been adhered to in this case, no information would have been given to the person summoned. And that which has been added is immaterial; it amounts to this, that the person summoned instead of denying that which is material, namely, that he is indebted, has only denied that which is immaterial, namely, the particular form and the particular character of the debt which he owes. When he is summoned before the judge to be present on the application, and when he is before the judge, it is not merely to be there and to hear what is said, but it is to take part in it for his own protection. It was for him, being before the judge, to state whether or not he denied that he owed anything, not merely that he denied that particular debt. If he had said, "I dispute my liability altogether," then the judge would have directed an issue, in which he would have

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been entitled to have the full particulars which he says ought to have been put into the original affidavit.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 25th Feb. 1892.

Solicitors for appellant: *Taylor & Taylor.*
Solicitors for respondent: *Coburn & Young.*

[HOUSE OF LORDS.]

H. L. (E.) 1892 *Feb.* 29.

LEWIS SIMMONS, TRADING AS THE DISCOUNT BANK OF LONDON . . . } APPELLANT;

AND

WILLIAM WOODWARD AND EVE MARY HESELTINE . . . . . } RESPONDENTS.

Bill of Sale—Bills of Sale Act 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9 *and Schedule—Names and Description of Parties—Address of Attesting Witness—Payment by Instalments.*

In a bill of sale the grantee was described as "The Discount Bank of London of 6 Duncannon Street Charing Cross (of which said bank Lewis Simmons of the same place is sole proprietor)." The assignment of the chattels was to "the said bank and its assigns" and Lewis Simmons was not again mentioned in the bill. The grantor agreed to pay the said bank the principal sum (£500) together with the interest then due "by monthly payments of £30 on the 18th day of every month." The bill was attested by W. G. C. "Clerk to the Discount Bank of London 6 Duncannon Street Charing Cross," at which address he was employed as clerk. In the affidavit of execution of the bill filed with the bill the attesting witness stated that he resided at another address. The chattels having been seized by Simmons for default of payment objections to the bill of sale were raised by a creditor on the ground that the description of the grantee was ambiguous and insufficient; that the address of the attesting witness was either not given at all or was incorrect; that the amount of the last instalment (being less than £30) was not accurately stated; and that the bill of sale not being in accordance with the form given in the schedule to the Bills of Sale Act 1882 was void:—

Held, that the objections were all groundless; that the grantee was

sufficiently described; that the address of the attesting witness was given and was sufficient; and that the provision for payment of instalments followed the form given in the schedule.

The decisions of North J. and of the Court of Appeal ([1891] 1 Ch. 464) reversed.

APPEAL from a decision of the Court of Appeal reported as *Woodward* v. *Heseltine* (1).

A bill of sale dated the 12th of June 1890 was expressed to be made between William Heseltine of the one part and "the Discount Bank of London of 6 Duncannon Street Charing Cross in the county of Middlesex (of which said bank Lewis Simmons of the same place is the sole proprietor) of the other part" and witnessed "that in consideration of the sum of £500 now paid to William Heseltine by the said bank the receipt of which the said William Heseltine hereby acknowledges, he the said William Heseltine doth hereby assign unto the said bank and its assigns all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £500 and interest thereon at the rate of 9*d.* in the pound per month. And the said William Heseltine doth further agree and declare that he will duly pay to the said bank the principal sum aforesaid together with the interest then due by monthly payments of £30 on the 18th day of every month, the first payment to be made on the 18th day of July next. Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said bank for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act 1882."

The execution of the bill by Heseltine was attested thus:—

"William George Cleverly
"Clerk to the Discount Bank of London
"6 Duncannon Street Charing Cross."

In the affidavit of execution of the bill filed with the bill the attesting witness deposed: "I reside at 12x Peabody Avenue Pimlico in the county of Middlesex and am clerk to the Discount Bank of London 6 Duncannon Street in the county of Middlesex."

(1) [1891] 1 Ch. 464.

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Heseltine died intestate on the 2nd of December 1890. On the 3rd of December Lewis Simmons seized the goods for arrears of debt. On the 8th of December the respondent Woodward as a creditor brought an action against Simmons and Heseltine's widow (the other respondent) for administration of Heseltine's estate, for a declaration that the bill of sale was void, and for an injunction to restrain Simmons from removing or disposing of the goods. North J. upon motion being of opinion that the bill of sale was void because the attesting witness had given his description but omitted his address granted an injunction (1). The Court of Appeal (Lindley, Lopes, and Kay L.JJ.) were of opinion that the address of the attesting witness was given and was sufficient but affirmed the order of North J. on the ground that the grantee was not described in the bill in accordance with the requirements of the Bills of Sale Act 1882 (2). Against these orders the present appeal was brought.

Feb. 23, 29. Sir *Horace Davey Q.C.* and *Bosanquet Q.C.* (*J. Holmes Poulter* and *Cluer* with them), for the appellant:—

This case illustrates the prejudice with which the Courts regard money lenders. First, as to the objection which the Court of Appeal held fatal. The description of the grantee is equivalent to "Lewis Simmons trading as the Discount Bank of London." In England and by English law a man may trade under any name he likes. So long as he gives in the bill of sale his real name as well as his trade name it is enough. All that is necessary is to enable him to be identified. The Court of Appeal seem to have thought there was an ambiguity and that because there was not "an irresistible inference" that the man and the bank were the same thing the bill was void. Where is the ambiguity? Can any one doubt that the bank was Lewis Simmons? What else can "sole proprietor" mean? "Sole partner" would be a contradiction in terms. A "bank" does not necessarily imply a corporation: e.g. Child's Bank, and many others in London and the country. There is nothing in the bill to suggest a corporation. A bill of sale must by s. 9 of the Act be "in accordance with the form in the schedule;" that

(1) [1891] 1 Ch. 467. (2) [1891] 1 Ch. 471.

does not mean "in the form;" see *Thomas* v. *Kelly* (1); *Ex parte McHattie, In re Wood* (2); *Downs* v. *Salmon* (3); *Lee* v. *Turner*. (4)

As to the objection held good by North J. the address of the attesting witness—that is the place where he is to be found during business hours—is given as 6 Duncannon Street Charing Cross. Why should it be assumed that that was part of his description? Nothing in the Act requires the witness to give the place where he resides, and *Stoy* v. *Rees* (5) which turned on words of an order which did require the place of residence to be stated has no application. But a man may reside where he carries on business though he does not sleep there and such an address is sufficient: *Hewer* v. *Cox*. (6)

Finlay Q.C. and *Ingpen*, for the respondent Woodward:—

This case is an illustration of the desire on the part of money lenders to mislead borrowers into supposing that they are dealing with an institution, not an individual. It is impossible to read this bill as a grant to Simmons without doing violence to the terms. The words are devised to convey to the borrower the idea that Simmons is not the same as the bank, that the lender is a corporation and not Simmons. Whatever ambiguity there may be that much is plain. The assignment is "unto the said bank and its assigns;" whereas, the form in the schedule is "unto C. D. his executors, administrators and assigns." Simmons is said to be not the bank but the proprietor of the bank. Having created this misleading idea the appellant cannot turn round and say he is the lender and the person entitled to seize. *Maugham* v. *Sharpe* (7) is distinguishable because the grant there was to "The City Investment and Advance Company" simply, without naming the persons who traded under that name, and as soon as they were ascertained the grant enured as a conveyance to them. So if the grant here had been to the bank simply and there had been a corporation of that name, it would

(1) 13 App. Cas. 506, 520.
(2) 10 Ch. D. 398.
(3) 20 Q. B. D. 775.
(4) 20 Q. B. D. 773.
(5) 24 Q. B. D. 748.
(6) 3 E. & E. 428.
(7) 17 C. B. (N.S.) 443; 34 L. J. (C.P.) 19, 23, 24.

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have been good. Where there is an ambiguity and you have to go out of the bill to explain it the objection is fatal, and the deed is void both at Common Law and under the Act.

Secondly, the attestation clause was insufficient because the address of the witness was not given. An affidavit supplying the deficiency does not cure the defect: *Blankenstein* v. *Robertson* (1). The words in the attestation clause "6 Duncannon Street Charing Cross" follow and were intended to refer to "the Discount Bank of London" and were not meant as the address of the witness, and that appears by his own affidavit which gives his real address.

Thirdly, the repayment is to be by monthly instalments of £30 each. £500 does not divide equally into multiples of 30, and the last instalment would be less than £30. Where the bill professes to name the instalments it must do so accurately. The amount was left vague on purpose that the borrower might suppose he was bound to pay £30, though less than £20 would be due, so that the lender might extract £30 on the ground that the calculation was complicated and £30 was named to save computation. Borrowers are a needy, improvident, confiding, easily imposed on class and were intended to be protected by the legislature, and the Acts should be construed by the Courts in that spirit.

The appellant's counsel were not heard in reply.

LORD HALSBURY L.C.:—

My Lords, I concur entirely with the observation of the learned counsel who has just addressed your Lordships, that this is not a case which admits of very long argument. The whole question seems to me to turn upon what is the true construction of the instrument which is before your Lordships for construction.

The first observation I have to make is, that it does not appear to me that the arguments which have been addressed to your Lordships have reference to the Bills of Sale Act at all. If they are good arguments, they are arguments against the validity of

(1) 24 Q. B. D. 543.

the instrument at Common Law. The form in the Bills of Sale Act has been copied, I should say servilely, and the allegation that the bill of sale in this case differs from the form in the Bills of Sale Act is not made out. There is a conveyance from one person to another, as to the validity of which I will say a word in a minute, but the form is exactly the form which is given in the Bills of Sale Act, subject to the observations which I am about to make as to the description of the grantee.

According to the Bills of Sale Act, it may be admitted the grantee must be described somehow—I think there is no particular description of the grantee enforced in the Act—but upon the face of this bill of sale (and that is the first point which is put before us for adjudication) there is a grantee. It does not, therefore, vary from the form given in the Act in that respect. But it is said that the description of the grantee is such that it is not positively certain upon the face of the instrument that the grantee is Mr. Lewis Simmons, and the form having been complied with, we must now see whether upon the face of the instrument, treating it as an instrument at Common Law, it can have any operation by reason of what is called the ambiguity in the instrument itself.

Now, as to that, I have to repeat the protest which I made during the argument, that it appears to me that that phrase is calculated to mislead. There is no ambiguity in the sense in which an ambiguous instrument or an ambiguous deed is spoken of. The deed itself purports to convey, without the smallest ambiguity, upon terms which are themselves without the least ambiguity, to the Discount Bank, of which Mr. Lewis Simmons is stated to be the sole proprietor. Of course there must be a grantee; and it appears to me that the case of *Maugham* v. *Sharpe* (1), to which your Lordships' attention was invited, is a very apt and cogent illustration of a very familiar principle of law, that where you are dealing with a grantee, you may describe that grantee in any way which is capable of ascertainment afterwards: you are not bound to give him a particular name; you are not bound to give his christian name or his surname; you may describe him by any description by

(1) 17 C. B. (N.S.) 443; 34 L. J. (C.P.) 19, 23, 24.

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which the parties to the instrument think it right to describe him. And here it appears to me beyond doubt (indeed, it could hardly be contested) that if this were an instrument at Common Law, and not brought within the ambit of what has been called the paternal legislation of the Bills of Sale Act, and if a person had had granted to him by this very description certain property, that property would pass to that person, and effect would be given to the passing of it as soon as it could be ascertained who that person was.

Now, looking at the instrument itself, it seems to me beyond all doubt that the parties have agreed that Mr. Lewis Simmons is the grantee, and that Mr. Lewis Simmons is capable of being described in the earlier part of the conveying portion of the instrument as the Discount Bank of London. Of course I cannot conceal from myself that, in dealing with bills of sale given to money lenders, when the question has come to be debated before a Court of law, such phrases as that used by Mr. Finlay as to a benevolent interpretation or the reverse have been used by learned judges. For myself, I entirely repudiate any such canon of construction. I must take the instrument such as it is. I do not care whether the person who is intended to enforce his rights under it is a money lender or not; I do not care whether the person who is borrowing is an ignorant person or not. I must give the same construction to the same words in the instrument, whosoever are the parties to it. Of course, when the Legislature itself has enforced certain securities in favour of a particular class of persons, I must give effect to the intention of the Legislature so far as the Legislature has expressed it. But I have already pointed out that, so far as the mere form is concerned, the form in the statute has been observed; and if the form in the statute has been observed, the only other question is that which was boldly argued by the learned counsel—namely, that at Common Law this deed would be bad, because there is no sufficient description of the grantee. I am unable to concur with that argument. It seems to me that the grantee is sufficiently ascertained; and under these circumstances, neither according to the provisions of the Bills of Sale Act nor according to the principles of Common Law regulating

the true construction of deeds, could there be any doubt whatever that Mr. Lewis Simmons was the grantee under this bill of sale.

My Lords, I do not think it necessary to say much about the two remaining points. The first of those points is that the address of the attesting witness is not given. That is a question of fact. Now, that this *may be* the address of the witness upon the face of the instrument, is not denied—it is possible. If it were not the address of the witness, I should quite agree that, as a matter of fact, the bill of sale had not complied with the provisions of the statute. But it is not denied that this is the place where the witness carries on his business. It is not denied that at this place during the ordinary hours of business the witness might be found. Therefore I am of opinion that the witness has given his address, although it might well be that, if it could be established that the witness was not there, the fact that he had merely put the address of his employer, and not his own private residence, would be insufficient; but if it is the address of his employer where he is personally employed, and where anybody can go and find him, and make any inquiries of him he pleases—if that is established as a fact, and it is not denied—it appears to me that the witness has complied with the provision of the statute which requires him to give his address.

My Lords, the third point it is very difficult indeed to deal with, because it first requires to be understood, and I am not quite certain that I have yet gathered its complete meaning. It appears to be this, that whereas an example is given of the form in the schedule, in which you are to state when the instalments are to be due, and the Legislature has there suggested a form in which the instalments are to be equal, therefore, unless the sum lent, together with interest (because it appears to me that the interest is an essential part of the instalments, according to the provisions both of the Act itself and of the form suggested in the Act, to give effect to the bill of sale), is capable of accurate subdivision, you cannot do it—that you cannot possibly make a bill of sale which shall have an unequal division of the sum lent. My Lords, I do not say that the learned counsel acquiesced

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in that view—on the contrary, I think they both repudiated it; but it seems to me that the argument, pushed to its logical extreme, comes to that. I am aware that one of the learned counsel said that all he would require was that the phrase "£20" should have occurred as descriptive of the last instalment, instead of "£30" in the present instance; but I am not disposed to accept his view of the provisions of the Bills of Sale Act. I think a bill of sale must comprehend, not only the principal sum, but the interest; and according to the contention, a somewhat elaborate calculation must be gone through, and the parties must insert the result of that calculation in the bill of sale in order to make the bill of sale good. My Lords, it seems to me that it is perfectly hopeless to substantiate any such contention. If the bill of sale in substance performs the function which the statute intended to be performed by that form, it appears to me that it is complied with; and to apply such—I was going to say nimia subtilitas—to a bill of sale, as is contended for, when a money lender is seeking to enforce his rights, seems to me to introduce a new canon of construction which I for one will not be a party to.

It seems to me, therefore, that in all these respects the argument of the respondents fails; and, with great respect to the Court of Appeal, I am unable to concur with their view that this is a question of ambiguity at all. It is a question of the due ascertainment of the grantee; and the identity of the grantee, I think, is quite susceptible of being ascertained at Common Law, and upon that point the Bills of Sale Act has made no difference at all from the Common Law.

Upon these grounds I am of opinion that the order appealed from ought to be reversed, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, three objections have been taken to this bill of sale. The first was sustained by the Divisional Court and rejected in the Court of Appeal; the second was discovered and sustained in the Court of Appeal; and the third is raised, for the first time, for your Lordships' consideration.

The statutory schedule requires that the attesting clause shall contain the "address" of the witness. That condition has, in my opinion, been substantially fulfilled, and the first objection fails, because the clause sets forth the place at which the witness was admittedly employed and was generally to be found during business hours.

Next, it is said that the grantee of the bill is described in terms so ambiguous that the document is invalidated by sect. 9 of the statute; and the Court of Appeal adopted that view. Neither the Act of 1882 nor its schedule prescribes the manner in which the grantee must be described. The schedule merely indicates by the letters C. D. those points in the context of the bill at which his name is to be inserted. If the name or description of the grantee be there inserted, and, though ambiguous, be such as would be held sufficient, without the aid of extrinsic evidence, in any mercantile document, I can find no provision in the Act which renders the bill of sale void on account of that ambiguity.

I am not, however, of opinion that there is any real ambiguity in the description which we have to consider. It is in these terms "The Discount Bank of London of 6 Duncannon Street Charing Cross in the county of Middlesex (of which said bank Lewis Simmons of the same place is the sole proprietor)." These words do not suggest to my mind that the Discount Bank of London of 6 Duncannon Street, is either a "corporation" or a "joint stock company." Mr. Lewis Simmons might be the sole corporator or he might be the sole member of a company, but he would not in either case be proprietor of a corporation or proprietor of a company. I think that the words when fairly construed mean this and no more: "Lewis Simmons, sole proprietor of a banking business which he carries on at the address given, under the name of the Discount Bank of London." I am, therefore, of opinion that the second objection taken to the bill of sale is without good foundation.

As for the third and last point raised, I have only to say that there is nothing objectionable in the language of the bill of sale which does not arise from the parties having followed word for word the language which the schedule prescribes.

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LORD MORRIS :—

My Lords, I concur.

LORD FIELD :—

My Lords, I concur.

Orders of North J. and of the Court of Appeal (so far as appealed from) reversed with costs in this House and below. Cause remitted to the Chancery Division.

Lords' Journals 29th Feb. 1892.

Solicitor for appellant: *Harold S. Simmons.*
Solicitors for respondent Woodward: *Leggatt, Rubinstein & Co.*

[HOUSE OF LORDS.]
[APPEAL COMMITTEE.]

H. L. (E.) 1891 Dec. 18.

GEORGE JOHNSON (PAUPER) . . . . APPELLANT;

AND

W. H. LINDSAY & CO. . . . . RESPONDENTS.

Practice—House of Lords—Costs—Pauper—Taxation—Costs of successful Pauper Appellant in House of Lords.

On the taxation of a pauper appellant's costs on a successful appeal in this House the fees of this House and the fees of counsel are to be disallowed, and the solicitor is to have his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks &c.

IN this appeal lately depending in this House (1) the appeal was allowed and the decision of the Court of Appeal reversed, and the House ordered that the respondents should pay to the appellant the costs incurred by him in the Courts below, and the costs incurred by him in respect of his appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis. Upon taxation of the appellant's costs in this House the officer of the House taxed upon the principle hitherto in force and allowed the fees of the House, fees to counsel, and the solicitors' costs and charges.

(1) [1891] A. C. 371.

The respondents then presented a petition to the House praying a review of the taxation, and referring to the practice in the Queen's Bench and Chancery Divisions, to the Rules of the Supreme Court 1883 Order XVI. rr. 22 to 31, and to the decision in *Carson* v. *Pickersgill* (1) and the observations of Lord Esher M.R.

The petition having been referred to the Appeal Committee the Committee met on the 7th of December 1891 when the following noble and learned Lords were present: Lord Halsbury L.C., and Lords Watson, Herschell, Macnaghten, and Morris. It was urged on behalf of the petitioners that in the case of a pauper appellant in this House the fees of the House are not required from him and he obtains the services of counsel and solicitor without remuneration; that if the appeal is dismissed no costs are given against him; and that if when the appeal is successful the appellant's costs are allowed and are taxed upon the principle hitherto in force in the House the respondent has to pay when he loses and not be paid when he wins, and moreover has to pay the appellant's costs—not of suing as a pauper but of winning as a pauper.

The solicitors for the appellant and respondents respectively having been heard the matter was reserved for consideration. On the 18th of December the Committee reported to the House that they were of opinion that the Taxing Officer of the House should be directed to review his taxation on the following basis: that in taxing the appellant's bill of costs—

1. The fees of this House are to be disallowed.
2. Also the fees of counsel.
3. The solicitor to have his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks &c.

Report agreed to by the House, and ordered accordingly.

Lords' Journals 18th December 1891.

Solicitors for appellant: *Langlois & Biden.*
Solicitors for respondents: *Finch & Turner.*

(1) 14 Q. B. D. 859, 868.

[HOUSE OF LORDS.]

H. L. (E.) 1892 March 3.

QUINTIN DICK HUME . . . . . APPELLANT;

AND

THE RIGHT HON. SIR HENRY CHARLES LOPES, AND THE RIGHT HON. WILLIAM WENTWORTH FITZWILLIAM HUME-DICK . . . . . RESPONDENTS.

Trustee—Investment of Trust Funds—Trust Funds, Meaning of—Instrument giving no Power to vary Investments—Power to vary existing Securities—Trust Investment Act 1889 (52 & 53 *Vict. c.* 32) *ss.* 3, 6.

The Trust Investment Act 1889 by sect. 3 enables a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest "any trust funds in his hands" in certain securities.

The words "trust funds in his hands" are not confined to trust moneys awaiting investment, but include all trust funds in the hands of the trustee whether at the time in a state of investment or not.

The decision of the Court of Appeal ([1891] 1 Ch. 423) affirmed.

APPEAL from an order of the Court of Appeal (1).

Quintin Dick by his will dated 30th of August 1844 gave all his real and personal estate to his executors and trustees upon trust to convert into money such part of the same (not being plate, books, pictures and jewels) as should not consist of money or securities for money or Government securities, and to invest the same in the public stocks or funds of Great Britain in their names, and to stand possessed of the same and of all other his residuary estate upon trust (with such consent as therein mentioned) to lay out and invest the same residuary estate, or such part or parts thereof as they might deem eligible or convenient, in the purchase of freehold lands of inheritance situated in Ireland to be vested in the trustees upon the trusts and to the uses therein mentioned, being limitations in settlement. And the testator directed that until his said residuary estate should be so laid out the trustees should pay and apply all income arising from the same or such part thereof as should not be so laid

(1) [1891] 1 Ch. 423.

out to and for the use of such person or persons as should from time to time be entitled under the aforesaid limitations to the possession or enjoyment of the real estates to be purchased. The will contained no power to vary investments.

The testator died on the 26th of March 1858. Part of the residuary estate had been invested in the purchase of lands in Ireland but there remained large sums of Government stocks in the names of the trustees. The respondent Hume-Dick who was tenant for life in possession requested the trustees to sell enough Government stocks to raise £106,900 and to invest that sum upon mortgages of freehold estates in England. The trustees took out an originating summons for the opinion of the Court whether they had power to do this. Stirling J. at Chambers decided that they had not. The Court of Appeal (Lindley, Fry, and Kay L.JJ.) held that the trustees had the power and varied the order of Stirling J. accordingly (1). From this decision this appeal was brought by the appellant on behalf of the remaindermen. The respondent Sir Henry C. Lopes was the surviving trustee, the other having died during the proceedings.

Cozens-Hardy Q.C. and *E. Beaumont* for the appellant:—

The question turns entirely on the construction of the Trust Investment Act 1889 (52 & 53 Vict. c. 32). By sect. 3 "it shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following"; then follows a list of permitted investments and the section concludes thus: "and also from time to time to vary any such investment." The words "trust funds in his hands" mean trust moneys requiring investment and do not include trust stocks or securities, or moneys already invested. This was the opinion of Lindley and Fry L.JJ. in the decision under appeal, and Kay L.J. seems to have held the same view. The words are similar to those used in Lord St. Leonards' Act (22 & 23 Vict. c. 35 s. 32), upon which it was held by Wood V.C. that there was no power to invest under the Act where the trust funds were already invested in Government stocks and the instrument (as in the present case) contained no power to vary

(1) [1891] 1 Ch. 423.

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any investment: *In re Warde* (1). That decision was a binding decision when the Act of 1889 was passed and the Legislature must have had it in view. It is true that in *In re Clergy Orphan Corporation* (2) in a question arising upon another statute Malins V.C. threw doubt upon the decision of Wood V.C., but no other case supports that view, and the decision of Wood V.C. remains. *Waite* v. *Littlewood* (3) does not affect the question. In *In re Manchester Royal Infirmary* (4) North J. decided the point now in question in favour of the appellant's contention. Possibly in an Act dealing with the criminal offence of embezzling "trust funds" those words might be held to include securities, but in such a statute as the present the decision of Wood V.C. should prevail. The power given in sect. 3 "to vary any such investment" has not the effect given to it by the Court of Appeal. The words are "any such investment," not "any such investments" as recited by the Lords Justices, and refer only to any investment made under the Act. If it had been intended to give the power contended for it would have been so expressed in clear language. The instrument gives no power to vary any investments and it is going far to construe the Act as giving a power to sell out stocks or securities in which a testator intended his estate to remain invested. Sect. 6 enacts that "this Act shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers hereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust." Those words do not confer the power if it is not given in sect. 3.

Farwell Q.C. and *Methold* for the respondent Hume-Dick:—

The Act was passed for the very purpose of amending the law and giving powers not given by the instrument. The Legislature must be taken to have had in view the decision of Malins V.C. (which though on a different statute was on similar words) as much as the decision of Wood V.C. Those decisions may be set off against one another and no inference should be drawn from either. The inconvenience of the appellant's construction

(1) 2 J. & H. 191.
(2) Law Rep. 18 Eq. 280.
(3) 41 L. J. (Ch.) 636.
(4) 43 Ch. D. 420.

is great. There is, it is said, no power to sell trust securities and invest under the Act; but there is a power to invest if securities have been sold in order to purchase land in Ireland and the purchase goes off at the last moment. Again, Government stocks left by the testator may not be sold and reinvested under the Act; but Government stocks in which the trustees have already invested under the Act may. Such anomalies cannot have been intended. In common parlance "trust funds" certainly include investments. They are used in the larger sense in sect. 5. Where the Legislature means to deal only with trust money the word "money" is used, as in sect. 7. Sect. 6 shews that the true construction is to read the Act into the instrument, unless the instrument contains an express prohibition. This makes the whole consistent. But even if this be not so the decision may be supported on the ground relied on by the Court of Appeal, viz. the power to vary.

Hornell for the respondent Lopes.

Cozens-Hardy Q.C. for the appellant in reply.

LORD WATSON:—

My Lords, I entirely agree in the result at which the Court of Appeal has arrived, but I am disposed to reach that result by a shorter road. In my opinion, the expression "trust funds" occurring in the commencement of sect. 3 of the Act of 1889 signifies funds belonging to the trust, including money invested on security or otherwise, as well as uninvested cash. I do not doubt that such is the ordinary and natural meaning of the words. Unless, therefore, some rule can be found which excludes that meaning in this particular context, that meaning must be attached to them.

Now, within the four corners of the Act itself, I can find nothing to suggest that the meaning of the words should be limited to actual cash waiting for investment. On the other hand, I find a good deal in the statute itself which suggests that no such limitation ought to be imposed. But then it is said that these words had previously acquired a technical meaning which

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the Legislature must be assumed to have had in view, and to have intended to attach to their use in sect. 3. It cannot be said that the words, according to their ordinary acceptation in a Court of Equity, have any such limited technical meaning as cash waiting for investment. What has been suggested is, that there are similar words occurring in older statutes having the same subject-matter as the present Act, namely, the investment of trust funds, and that the words were there used in the limited sense contended for by the appellant.

If there had been a series of statutes using the same expression, and it had been authoritatively construed by a series of decisions, that would have raised a case for your Lordships' consideration very different from that which is now presented to us; because, upon an examination of the authorities, the argument comes to this, that in the Vice-Chancellor's Court, upon statutes containing similar expressions, those expressions were construed in two different ways by two different judges—one giving the words their primary and natural meaning, the other giving the words the restricted meaning which I have explained. I do not think that in that state of the authorities it can be reasonably suggested that the Legislature had in view any meaning of the words other than their natural and popular meaning. If that be so, cadit quæstio. It is admitted that so reading the statute the judgment of the Court below is right.

I therefore move your Lordships that the order appealed from be affirmed, and I would suggest to your Lordships that in regard to the costs you should pronounce the same order as that which has been made in both Courts below.

LORD MACNAGHTEN :—

My Lords, I am of the same opinion. I do not myself feel the difficulty which seems to have pressed upon the Court of Appeal with regard to the earlier words of sect. 3 of the Act of 1889. That section authorizes "a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands" in the manner there specified. I do not see why those words should be limited to cash waiting investment. They appear to me to be the widest words pos-

sible, and to include all funds belonging to the trust and under the control or dominion of the trustee. I read the words in the section as authorizing a trustee to invest any trust funds in his hands, whether at the time in a state of investment or not, in the securities mentioned in the Act.

As regards the costs, I agree to the motion which has been proposed.

LORD MORRIS :—

My Lords, I concur entirely in the judgments which have been delivered by the noble and learned Lords who have preceded me.

LORD FIELD :—

My Lords, I am also of opinion that this judgment should be affirmed. The first question which arises upon the language of the Act is whether or not trust moneys having been already invested and converted into a Government stock, they are "trust funds" within the meaning of the 3rd section. Now, I think it is quite possible, and even probable, that the words used there may be large enough to include what we have to deal with, but I prefer putting my judgment upon the same ground as that taken by the Lords Justices in the Court of Appeal. It appears to me that the effect of sect. 6 is plainly that the powers conferred by the previous sections of the Act are to be "in addition to the powers conferred by the instrument creating the trust." I therefore think that, according to what Lord Justice Fry says was suggested by Mr. Farwell in his argument, the first thing to do is to read into the instrument creating the trust the various securities contained in sect. 3. If that is done, it seems to me quite clearly to follow from that, that these securities so read in are subject to the power to vary contained in the end of the 3rd section.

LORD HANNEN :—

My Lords, I entirely concur in the judgment which has been delivered by the noble and learned Lords who first spoke; but

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my noble and learned friend near me (Lord Field) has said that he prefers to rest his judgment upon the reasons given in the Court of Appeal, and I confess that I also have that inclination. The interpretation put upon the clauses in the Court of Appeal is such as commends itself to my judgment, and I think that the concluding words of the section mean any such investment as has been referred to, at whatever time made, whether made by the creator of the trust in his lifetime or made afterwards by the trustees. However, in either point of view, I think the order is right and should be affirmed.

Order appealed from affirmed; the parties to this appeal to have their costs, taxed as between solicitor and client, paid out of the trust funds.

Lords' Journals 3rd March 1892.

Solicitors for appellant: *Munns & Longden.*
Solicitors for respondents: *Arnold & Henry White.*

[HOUSE OF LORDS.]

H. L. (E.) 1892 *March* 7.

WILLIAM HENRY ROGERS AND MARIA HENRIETTA RICHES, TRADING AS ROGERS & SON . . . . . } APPELLANTS;

AND

WILLIAM WHITELEY . . . . . RESPONDENT.

Practice—Garnishee Order—Attachment of Debt—Attachment of Part of Debt—Balance in Hands of Garnishee—Order XLV., *rr.* 1, 2.

A garnishee order nisi which attached all debts owing or accruing due from the garnishee to the judgment debtor was served on the garnishee who had in his hands as banker moneys belonging to the judgment debtor exceeding the amount of the judgment debt. The judgment debtor having brought an action against the garnishee for refusing to honour cheques which the judgment debtor drew on the balance over and above the amount of the debt:—

Held, affirming the decision of the Court of Appeal (23 Q. B. D. 236) that an order made in these terms attached the whole of the moneys,

that the garnishee was right in dishonouring the cheques, and that no action lay.

Semble, that the operation of such an order may be restricted by the Court or a judge to such an amount of the debts owing by the garnishee as will satisfy the judgment debt.

APPEAL from a decision of the Court of Appeal (1).

The appellants brought an action against the respondent claiming (inter alia) damages for injury to the appellants' credit and reputation by reason of the respondent as the plaintiffs' banker having wrongfully refused to honour cheques drawn on him by the plaintiffs. At the trial before Pollock B. and a special jury it appeared that there was standing to the credit of the appellants at the respondent's bank on a current account and on a deposit account taken together a balance of over £6800. One Elizabeth Holloway who was a judgment creditor of the appellants for £6000 obtained a garnishee order nisi which ordered that "all debts owing or accruing due" from the respondent to W. H. Rogers be attached to answer the sum of £6000. This order was served on the respondent and gave him notice to attend at chambers at a certain time on an application by the judgment creditor "that the said garnishee pay the debt due from him to the said judgment debtor or so much thereof as may be sufficient to satisfy the judgment." In consequence of this order the respondent refused to honour cheques drawn by the appellants upon the balance between £6000 and the amount standing to the appellants' credit at the respondent's bank. On this part of the case Pollock B. ruled that the defendant was bound by the garnishee order. The jury found that, as between the plaintiffs and defendant, W. H. Rogers and Rogers & Son were the same and upon the case generally found a verdict for the defendant. Pollock B. then gave judgment for the defendant. An application to set aside the verdict and judgment and for a new trial upon the ground (inter alia) of misdirection was refused by the Divisional Court (Mathew and Grantham JJ.) and that decision was affirmed by the Court of Appeal (Lord Coleridge C.J., Lindley and Lopes L.JJ. (1).

(1) 23 Q. B. D. 236.

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March 3, 4, 7. *E. H. Pollard* and *J. R. Paget* for the appellants:—

The question is what is the effect of a garnishee order nisi which attaches "all debts owing or accruing due" from the garnishee to the judgment debtor. The order was in accordance with Order XLV. r. 1 and the forms (Nos. 39 and 40) given in Sched. K., but it cannot have been intended to attach more than was enough to satisfy the judgment debt. The real meaning of the order is that the garnishee is to retain enough to satisfy the judgment debt and no more. Otherwise a banking account for £50,000 might be attached for a debt of £10 which was not paid because it was disputed, and the garnishee would be unable to draw any cheques. Such a construction would work great hardship and injustice. In foreign attachment part of a debt may be attached. "If the debt be larger than the attaching creditors' debt, a portion of such debt may be attached:" Brandon, Foreign Attachment, p. 24. The words of Order XLV. r. 1 and of the forms 39 and 40 in Sched. K. are the same as those used in the Common Law Procedure Act 1854 s. 61, and upon that statute Parke B. was of opinion that a portion of a debt might be attached: *Johnson* v. *Diamond* (1). Com. Dig. "Attachment" (C) says "There may be an attachment for part of a debt." Warburton J. said "that by the custom of London part of a debt might be attached" (2). Bohun's Privilegia Londini, p. 197 (ed. 1702) makes the same statement, and see *Robbins* v. *Standard* (3).

[They also referred to *In re Smith, Ex parte Brown* (4); and *Culverhouse* v. *Wickens* (5).

Waddy Q.C. and *T. Willes Chitty* for the respondent were not heard.

LORD HALSBURY L.C.:—

My Lords, I am not going to offer any opinion (the question not being necessary to be determined here) upon the question

(1) 25 L. T. O. S. 85, 86.
(2) Godbolt, pp. 195, 196, No. 282.
(3) 1 Sid. 327.
(4) 20 Q. B. D. 321.
(5) Law Rep. 3 C. P. 295.

whether it is competent to a judge to make a garnishee order attaching only a part of a debt. That is a very fit question to be discussed in the Legislature perhaps and to be argued before your Lordships if such a question shall arise. It is enough for me to say in reference to this case that the order as it is made, in the terms in which it is made, attaches all debts, that is to say all money which Mr. Whiteley could be called upon to pay away although more than the amount sufficient to satisfy the particular debt in question, and if he paid it away he would do so at his own risk, which of course he would not be bound to do. The order appears to me to have been in such terms that it would have been a disobedience to the order on his part if he had paid anything after it had been served upon him. That being so it disposes of that part of the case which raised the question whether he was bound to pay while that order was in force. I think he was not. I think it would have been wrong to pay. Of course therefore while the debts were under that order of the Court it would be impossible to say that he could be responsible for any damage claimed as being caused to the plaintiff in this case.

I move your Lordships that the appeal be dismissed with costs.

LORD WATSON :—

My Lords, the appellant impeaches a direction in law given by the Judge, and maintains that he ought to have a new trial. The respondent was owing the appellant, partly on deposit account and partly on account current, sums amounting in all to about £6800 when he was served with a garnishee order at the instance of a judgment creditor of the appellant whose debt was £6000. The appellant maintained at the trial that he was entitled, notwithstanding the order attaching the debt to draw out the balance of £800. The attachment was in the form sanctioned by Order XLV. r. 1 of "all debts owing or accruing due from the above named garnishee to the above named judgment debtor," and Baron Pollock ruled that so long as the attachment subsisted the respondent was under no legal obligation to pay the balance, or any part of it, upon the order of the appellant.

Many nice questions may arise in the application of Order XLV.,

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but I do not think the point which we are called upon to decide in this case is attended with the least difficulty. The effect of an order attaching "all debts" owing or accruing due by him to the judgment debtor is to make the garnishee custodier for the Court of the whole funds attached; and he cannot, except at his own peril, part with any of those funds without the sanction of the Court. Whether the order can in the first instance issue in other terms than those prescribed by the rules it is not necessary for the purposes of this case to decide; but I entertain no doubt that when the attachment has been made in these terms it is within the power of the Court to restrict its operation to such an amount of the debts owing by the garnishee as will satisfy the judgment debt; but so long as such restriction is not made and the attachment is unreleased the garnishee is under no obligation to disregard the attachment and to pay the excess to his creditor.

At the bar of the House the appellant mainly relied in argument upon the terms of the garnishee order, which he maintained did not lay an attachment upon the whole debts owing to him by the respondent, but only upon such part thereof as was sufficient to meet the judgment debt. The argument is so plainly untenable, that I think it unnecessary to take any further notice of it.

I concur in the judgment which has been moved by the Lord Chancellor.

LORD MACNAGHTEN :—

My Lords, I entirely agree in the proposed judgment.

LORD MORRIS :—

My Lords, I entirely concur in the judgment which has been announced by the Lord Chancellor, and in the opinion of my noble and learned friend opposite, who followed. I only desire to add a few words as regards the dishonouring of the cheques. Upon the proper construction of the garnishee order, which has been relied upon by the defendant as a protection to him for having refused to pay the drafts of the plaintiff, it has been contended very forcibly by the learned counsel for the appellant that your Lordships should give what he suggests would be only

a reasonable construction to the order in consequence of the irreparable mischief which might arise from giving it what would be apparently a fair construction of it upon the words as they stand.

He suggests that your Lordships should attach to the words "to answer" a meaning which would include "to the amount of the judgment recovered by the judgment creditor." I cannot concur in that contention, because in this order which is before your Lordships it is very plain upon the face of it that all debts due and owing by the above-named garnishee are attached to answer the judgment creditor's demand—that is, they are all captured for the purpose of afterwards answering that demand.

I cannot, however, rest here without saying that in my judgment a great deal of the argument addressed by the learned counsel for the plaintiff can be answered if your Lordships are of opinion, as I am undoubtedly of opinion, that it would be quite competent for the judge in making the garnishee order (indeed, in the particular state of facts which is alleged, he ought so to make the order) to make it so that the amount of the debts attached should only extend to an amount sufficient to answer the judgment. I can find nothing in the rules of Order XLV. which limits the power and discretion of the learned judge to giving an authority to attach *all* debts, and does not enable him to limit its operation to the amount of the judgment creditor's debt. I can see no objection to that course. It would appear to me to be quite open, upon the order, to the learned judge to take that course, and it would defeat all the arguments which, in my humble judgment, your Lordships cannot shut your eyes to, such as that a judgment creditor for a small amount of debt, say £5 or £10, might get a garnishee order to attach £50,000 in the bank in order to answer that small debt of £5 or £10. My Lords, in this particular case which is now before your Lordships, it does not carry the plaintiff's case any further to call upon your Lordships to attach to the words "to answer" a meaning extending merely to the amount of the judgment debt. If these words or words to that effect had been put in the order, they would have controlled it. However, no such words having been put into the order, I come to the conclusion that the order is an

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order extending to the entire amount of debts, and that the entire amount of debts is attached to answer the demand of the judgment creditor, and that it is not limited merely to the extent of his judgment debt.

With these observations, my Lords, I entirely concur in the proposed judgment.

LORD FIELD :—

My Lords, I am of opinion that this appeal has failed, and upon the grounds which have been so clearly and fully stated by my noble and learned friends. I am quite satisfied, in this case, that the construction which my noble and learned friends have put upon the order is the correct one. I do not think that the form of the order itself has in the present case been productive of any injustice whatever to the appellant. I am not quite prepared at this moment to say whether I would concur with what I understand to be the view of my noble and learned friend who has just addressed your Lordships, namely, that it would be competent to a Judge at Chambers, upon the construction of this order, to make the limited garnishee order which he suggests; but I think it may well be a fit matter for the distinguished persons who have the making of these rules to consider whether or not some form of words might be adopted which would at the same time meet the possible injustices that might arise from this order and the fair interests of judgment creditors.

As to the appeal now before your Lordships, I have no hesitation in saying that it ought to be dismissed.

LORD HANNEN :—

My Lords, I entirely concur in the proposed judgment for the reasons given by the Lord Chancellor and my noble and learned friend opposite (Lord Watson) and I think this appeal should be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 7th March 1892.

Solicitors for appellants: *Morley, Shirreff & Co.*
Solicitors for respondent: *Roche & Son.*

[HOUSE OF LORDS.]

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THE OOREGUM GOLD MINING COMPANY OF INDIA, LIMITED . . . . } APPELLANTS;

AND

GEORGE ROPER AND CHARLES HENRY WALLROTH . . . . . } RESPONDENTS.

CHARLES HENRY WALLROTH . . . APPELLANT;

AND

GEORGE ROPER AND THE OOREGUM GOLD MINING COMPANY OF INDIA, LIMITED . . . . . } RESPONDENTS.

Company—Issue of Shares at a Discount—Registered Contract—Companies Act 1862 (25 & 26 *Vict. c.* 89) *ss.* 7, 8, 12, 25, 38—*Companies Act* 1867 (30 & 31 *Vict. c.* 131) *s.* 25.

A company limited by shares, formed and registered under the Act of 1862, has no power to issue shares as fully paid up, for a money consideration less than their nominal value.

The memorandum of association of a company registered under the Act of 1862 stated that the capital of the company was £125,000 divided into 125,000 shares of £1 each, and that the shares of which the original or increased capital might consist might be divided into different classes and issued with such preference, privilege, or guarantee as the company might direct. The company being in want of money and the original shares being at a great discount, the directors in accordance with resolutions duly passed issued preference shares of £1 each with 15*s.* credited as paid, leaving a liability of only 5*s.* per share. A contract to this effect was registered under the Companies Act 1867 s. 25. The transaction was bonâ fide and for the benefit of the company. In an action by an ordinary shareholder to test the validity of the issue:—

Held, affirming the decision of the Court of Appeal, that reading the Companies Acts of 1862 and 1867 together the issue was beyond the powers of the company, and that the preference shares so far as the same were held by original allottees were held subject to the liability of the holder to pay to the company in cash the full amount unpaid on the shares.

Lord Herschell would have held (had the point been insisted on at the bar) that the company were not entitled to call upon the preference share-

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holders for any further payment beyond that agreed upon, except in the case of a winding-up and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding-up.

THESE were consolidated appeals from an order of the Court of Appeal, and raised the same question.

The following statement of the facts (certain formal parts excepted) is taken from the judgment of Lord Herschell:—

The Ooregum Gold Mining Company, Limited, was incorporated in October 1880 under the Joint Stock Companies Acts 1862 to 1880. The statement contained in the memorandum of association with reference to the capital of the company was as follows:—"The capital of the company is £125,000, divided into 125,000 shares of £1 each, and the shares of which the original or increased capital may consist may be divided into different classes and issued with such preference, privilege, guarantee, or condition as the company may direct" (1). Forty thousand of the shares were allotted to the vendors to the company, the residue were issued to the public, and the full amount paid thereon. The operations of the company were not, in the first instance, successful, and a winding-up order was obtained. An application was subsequently made to the Court for an order to stay the winding-up, with a view to the introduction of fresh capital and a resumption of mining operations, and an order was made ac-

(1) The following articles of association were referred to in argument:—

Art. 8: The company may from time to time, whether all the shares for the time being authorized shall have been issued or not, by special resolution, modify the conditions contained in its memorandum of association, so as to increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts issued either wholly or partially with or without any such guarantee or right of preference, whether in respect of dividend or of repayment of capital, or both, or with or without any such other special rights, privileges, priorities, or advantages, or subject to any such provisions or conditions, and generally on such terms as the company by special resolutions passed and confirmed at the respective meetings, authorizing such increase, may direct, or if and so far as no such special direction is given, as the board may think expedient.

Art. 30: The directors may decline to register any transfer of shares made by a member to any person not approved by them. But this article shall not extend to shares fully paid up or issued as fully paid up.

Art. 112: The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

cordingly. In pursuance of this policy an extraordinary general meeting of the company was summoned in 1885, at which it was resolved that the capital should be increased by the issue of 120,000 preference shares of £1 each, to be credited in the capital and books of the company as having the sum of 15*s.* per share paid thereon, such preference shares carrying the right to a non-cumulative preference dividend up to 10 per cent. on the nominal amount of such preference capital out of the profits of the undertaking each year, and to equal participation (share per share) with the ordinary shares in such further profits as should remain for distribution each year after the payment of the above 10 per cent. preference dividend. The special resolution so passed was duly confirmed. At this time the market value of the ordinary shares was only 2*s.* 6*d.* per share.

Upwards of 100,000 of these preference shares were allotted, with 15*s.* credited as paid thereon. Prior to the actual allotment an agreement was entered into between the company, of the one part, and an agent or trustee for the several persons whose names were entered in the schedule thereto, of the other part, whereby, after reciting the agreement to issue the shares at a discount of 15*s.* per share, and that 1*s.* had been paid on allotment, it was agreed that the shares to be allotted should be held as shares on which 16*s.* per share had been paid, and should be subject and liable to further payment of 4*s.* per share, and no more, and the company thereby undertook to cause the agreement to be registered at the Joint Stock Registration Office, pursuant to the Companies Act 1867, before the issue of the shares. The agreement was duly filed accordingly. The capital raised by means of the issue of the preference shares sufficed to discharge the obligations of the company, to extricate it from its difficulties, and to give it a new start. Gold to a considerable amount was shortly afterwards raised from the mines, and the company has since been prosperous, the market value of the ordinary shares having risen to about 40*s.*

In February 1889 the Respondent, George Roper, purchased on the Stock Exchange and paid for ten fully paid-up ordinary shares in the company. On the 15th of July following on behalf of himself and the other ordinary shareholders Roper

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brought this action against the company and Wallroth (as an original allottee of the preference shares and as representing the other original allottees) to have it declared that the issue by the company of the 120,000 preferred shares, at a discount of 15*s.* per share, was ultra vires, and to have the register rectified accordingly and other consequent relief granted. The statement of claim contained the allegation that the company had in 1889 issued debentures to the amount of £20,000, which were charged on all the property of the company, and which were then outstanding. It further alleged as follows:—"The defendant company had no power to issue the said preferred shares at a discount, and the entry of the preferred shares in the register book as fully paid-up should be rectified. The said preferred shares are now quoted on the Stock Exchange at a premium, and if the said entry is rectified the ordinary shares will benefit thereby, and the 15*s.* unpaid on the preferred shares will be available for paying off the said debentures as and when they fall due."

North J. upon the authority of *In re Almada and Tirito Company* (1) without argument made an order declaring that the issue of the preferred shares of £1 each at a discount of 15*s.* per share was beyond the powers of the company, and that the said shares so far as the same were held by Wallroth or by original allottees represented by him were held subject to the liability of the holders to pay to the company in cash so much of the £1 per share as had not been paid on the same; and ordering that the company do rectify the register in accordance with the above declaration. This order was affirmed by the Court of Appeal without argument. Against these orders appeals were brought by the company and by Wallroth.

1891. July 28, 30. Sir *Horace Davey* Q.C. (*Grosvenor Woods* with him) for the company and

Rigby Q.C. (*Bramwell Davis* with him) for Wallroth:—

These consolidated appeals raise the same question, viz. whether a limited company registered under the Companies

(1) 38 Ch. D. 415.

Acts of 1862 and 1867 can issue shares as fully paid up upon which a less sum than the nominal value has been paid; in other words whether the decision in the Court of Appeal in *In re Almada and Tirito Company* (1) was right. There is no question in the present case as to the bona fides of the transaction, and the issue was sanctioned both by the memorandum of association and the articles. Art. 8 specially provided for such an issue. The only dispute is as to the issue being prohibited by the Companies Acts. This company was in difficulties: money was wanted; unless a large sum could be raised the undertaking must fail and the company be wound up. No other means of raising money were available except the issue of shares at a discount so as to place the new holders on the same footing as the old. A commercial company may do in the furtherance of its legitimate objects anything which is not prohibited, and there is no intrinsic impropriety in such a transaction as the present, either under the general law of partnership or under the Companies Acts. Sect. 7 of the Act of 1862 contemplates the liability of the members being limited either to the amount unpaid on the shares or to such amount as the members may undertake by the memorandum of association to contribute to the assets in the event of a winding-up. Sect. provides that the memorandum of association shall contain (inter alia) "the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount." "The capital" there means the nominal, not the real, capital. And so in the memorandum of association "The capital of the company is £125,000, divided into 125,000 shares of £1 each," means the nominal capital not the real capital. What is meant is that £125,000 is the limit: not that there must be £125,000: for the whole may never be paid up. In many cases, probably in most, a company does not issue the whole of its capital. Sect. 12 empowers the company to raise new shares, and it may be that in such a company as this new shares may be issued at a discount though the original shares could not be so issued. Sect. 25 of the Act of 1862 seems distinctly to recognise that the liability need not of necessity extend to the whole amount

(1) 38 Ch. D. 415.

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actually unpaid, for it requires to be entered on the register among other particulars "the amount paid or *agreed to be considered as paid* on the shares of each member." So far there is certainly no prohibition on the issue of shares at a discount. But it is said there is an implied prohibition in sect. 38 which enacts that no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares. That fixes the maximum liability. What is there to imply that it shall also be the minimum? Moreover it has frequently been held that shares may be allotted as fully paid up in respect of property or goods acquired by the company. And sect. 25 of the Act of 1867 says in effect that "no contract by which shares shall be considered as duly paid up when they are not in fact paid up shall be valid unless it be registered; and that when there is no such registered contract the shares are to be payable in cash." This was the view of Lord Blackburn in *Burkinshaw* v. *Nicolls* (1). The decision in that case and the reasoning of Lord Cairns and of the other Lords are inconsistent with the view that the Acts prohibit such a transaction as the present. So is the decision in *Waterhouse* v. *Jamieson* (2). Shares at a discount may be allotted as fully paid up in payment of land, goods or the loan of money from a bank. And why not to a new shareholder? The principle is the same. The same thing might have been done in another form by issuing 5*s*. shares fully paid with a right to a larger dividend. The bargain is not nudum pactum: it is not like the case of a debtor for £20 satisfying his debt by paying £15. There is no antecedent liability to pay anything more than the 5*s*. Nor does the memorandum of association create an inextinguishable liability to pay 20*s*. For if so how could a company be estopped (as it may be in certain cases) from denying that the shares are fully paid up?

With regard to the issue of new shares at a discount the Legislature would seem to have authorized it by sects. 56 and 60 of the Companies Clauses Consolidation Act 1845 (8 & 9 Vict. c. 16). Then came the Companies Clauses Act 1863 (26 & 27 Vict. c. 118) which by sect. 21 empowered the issue of new shares, "but so that not less than the full nominal amount of any

(1) 3 App. Cas. 1004, 1015. (2) Law Rep. 2 H. L., Sc. 29.

share or portion of stock be payable or paid in respect thereof." Those prohibitory words were repealed by sect. 5 of the Companies Clauses Act 1869 (32 & 33 Vict. c. 48). And there is no difference between the language of the Companies Clauses Act 1863 and the language of Table A, Arts. 26, 27 in the Schedule to the Act of 1862, with reference to the issue of new shares.

[The following cases were also referred to: *Spargo's Case* (1); *Anderson's Case* (2); *In re Gold Company* (3); *In re Plaskynaston Tube Company* (4); *In re Ince Hall Rolling Mills Company* (5); *In re Addlestone Linoleum Company* (6).]

Cozens-Hardy Q.C. and *Mulligan* for Roper:—

The liability of a shareholder in these companies is unlimited except so far as it is limited by statute. And in this case there is nothing in the memorandum of association nor in the articles limiting the liability. The memorandum fixed the capital of the company at £125,000, divided into 125,000 shares of £1 each. That was in accordance with sect. 8 of the Act of 1862. It would entirely frustrate the meaning of the memorandum and of that section if the company could by resolution alter the amount to be paid on each share. The limit to the liability is fixed by the memorandum at £1: a resolution of the company is not part of the memorandum and cannot vary its effect. Sect. 7 of the Act of 1862 says that the liability may be limited by the memorandum: that means that it cannot be limited in any other way, and the Act must be strictly followed: see the observations of Lord Selborne in *Dent's Case* (7) and *Fothergill's Case* (8). Sects. 8 and 38 of the Act of 1862 must be read together and mean that every shareholder shall pay or become liable for the full nominal value of the shares he holds. "The amount, if any, unpaid" refers to the fixed amount of the shares into which the capital is divided by the memorandum. It is no answer to say that sect. 25 of the Act of 1867 permits shares to be issued at a discount in payment of land or goods, provided the contract

(1) Law Rep. 8 Ch. 407.
(2) 7 Ch. D. 75.
(3) 11 Ch. D. 701.
(4) 23 Ch. D. 543.
(5) 23 Ch. D. 545, n.
(6) 37 Ch. D. 191.
(7) Law Rep. 8 Ch. 768, 775.
(8) Law Rep. 8 Ch. 270.

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is registered. The policy of the Acts is that shares must be paid for in meal or in malt, either in cash or in something equivalent in value to the company. In the present case the preference shareholders have given no equivalent in value for the unpaid 15*s*. They have obtained £1 shares by payment of or by incurring the liability to pay 5*s*. only. Such transactions may be (as in the present case) perfectly bonâ fide, but they are obviously open to great abuse and the Legislature must not be taken to have sanctioned them except upon the clearest language. The conditions under which a company may reduce its capital are carefully prescribed by ss. 9–20 of the Act of 1867 and are not consistent with the principle contended for by the appellants. The amount of capital was intended by the Legislature to be definite, not indefinite as it would be if the directors had the power of issuing shares at a discount. The appellants' argument runs counter to the principle of *Trevor* v. *Whitworth* (1) where this House held that a company cannot purchase its own shares.

[They also referred to *In re Dronfield Silkstone Coal Company* (2); *Ex parte Sandys* (3); *Andress' Case* (4); *Klenck* v. *East India Company for Exploration and Mining, Limited* (5).]

Sir *Horace Davey* Q.C. in reply:—

If the respondents' argument be right it must be ultra vires to issue shares at a premium: e.g. £1 shares at 25*s*., 10*s*. paid, leaving 15*s*. unpaid. Yet this is common practice. The argument that money required for machinery and plant may be obtained by shares issued at a discount, but that the working capital of the company may not be so obtained is unreasonable and contrary to the practice and business habits of mankind. Excluding fraud or misrepresentation there is no objection to such a bargain as the present. Fresh capital was absolutely necessary. It could not be obtained on better terms: it saved the company and turned impending ruin into success. Is not that a good consideration? Is it not "meal or malt"? The

(1) 12 App. Cas. 409.
(2) 17 Ch. D. 76.
(3) 42 Ch. D. 98.
(4) 8 Ch. D. 126.
(5) 16 Scotch Sess. Cas. 4th Series, 271.

value of the shares to the company was what could be got for them in the market.

[He also referred to *Ramwell's Case* (1); and *Pell's Case* (2).]

The House took time for consideration.

1892. March 14. LORD HALSBURY L.C.:—

My Lords, the question in this case has been more or less in debate since 1883, when Chitty J. decided that a company limited by shares was not prohibited by law from issuing its shares at a discount. That decision was overruled, though in a different case, by the Court of Appeal in 1888, and it has now come to your Lordships for final determination.

My Lords, the whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limits it is free to act. Now, confining myself for the moment to the Act of 1862, it makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a *certain fixed amount*. It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing.

I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security.

It may be that such limitations on the power of a company to

(1) 29 W. R. 882. (2) Law Rep. 5 Ch. 11.

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manage its own affairs may occasionally be inconvenient, and prevent its obtaining money for the purposes of its trading on terms so favourable as it could do if it were more free to act. But, speaking for myself, I recognise the wisdom of enforcing on a company the disclosure of what its real capital is, and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit.

I think, with Fry L.J. in the *Almada and Tirito Company's Case* (1), that the question which your Lordships have to solve is one which may be answered by reference to an inquiry: What is the nature of an agreement to take a share in a limited company? and that that question may be answered by saying, that it is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am therefore of opinion that, treating the question as unaffected by the Act of 1867, the company were prohibited by law, upon the principle laid down in *Ashbury Company* v. *Riche* (2), from doing that which is compendiously described as issuing shares at a discount.

The question remains whether sect. 25 of the Act of 1867 has made any difference in the matter now under discussion. That section prescribes that every share in any company shall be deemed and taken to have been issued and to be held *subject to the payment* of the whole amount thereof *in cash*, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. Two things are manifest in this provision. The share is to be held subject *to payment*, and the payment is to be *in cash*. The amount is to be paid and the whole amount to be paid *in cash*, and to me it appears, looking at the latter part of the section, whereby a contract made and filed may qualify and cut down the form of payment, and that it may be in goods or in value received in some form, instead of in cash, it must nevertheless be payment. I regret that the words *in cash* have received a judicial exposition which allows payment other-

(1) 38 Ch. D. 415. (2) Law Rep. 7 H. L. 653.

wise than in cash, and I hold myself free, if the question should ever come before your Lordships, to consider the propriety of that decision. But for my present purpose it is enough to say that there is nothing in the section which justifies the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all.

The provisions of sect. 25 were probably to put a stop to such transactions as had become the subject of judicial animadversion in *Pellatt's Case* (1); *Elkington's Case* (2); also *Fothergill's Case* (3); and *Dent's Case* (4).

My Lords, I should have been prepared to take this view if the matter were not covered by authority. But it seems to me that, although not directly in point, the principle laid down by your Lordships' House in *Trevor* v. *Whitworth* (5) would render it extremely difficult to so read the sections to which I have referred as to justify the appellants' contention.

Under these circumstances, it seems to me impossible to arrive at any other conclusion than that this appeal must be dismissed with costs. Accordingly, I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, can a company limited by shares, formed and registered under the Act of 1862, issue its shares as fully paid up, for a money consideration less than their nominal value? That was the only question argued in these appeals. It has been answered in the negative by both Courts below, without hearing argument, upon the authority of the *Almada and Tirito Company's Case* (6), decided by the Court of Appeal in 1888. The limitation of such a company's liability is the creature of statute, and the question lies within a narrow compass, depending on the construction of one or two clauses in the Companies Acts of 1862 and 1867.

The Act of 1862 (sect. 8 (5)) requires that, in the case of a company limited by shares, the memorandum of association

(1) Law Rep. 2 Ch. 527.
(2) Law Rep. 2 Ch. 511.
(3) Law Rep. 8 Ch. 270.
(4) Law Rep. 8 Ch. 768.
(5) 12 App. Cas. 409.
(6) 38 Ch. D. 415.

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shall contain the amount of the capital with which it proposes to be registered, divided into shares of a certain fixed amount. The statutory limitation which it imposes upon the liability of individual shareholders is contained in the enactment (sect. 38 (4)), that "no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." In my opinion, these enactments read together indicate the intention of the Legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value. The "amount, if any, unpaid," obviously refers to the "fixed amount" of the shares into which the capital is divided, as set forth in the memorandum, and not to any lesser amount which may be agreed upon between the company and its shareholders; and the statutory liability of each shareholder is for the difference between the amount fixed by the memorandum and the sum which has actually been paid upon his shares. Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the share must, by force of the statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance, when duly called for.

A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The

Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice.

The Companies Act of 1867 contains one clause only which can affect the present question. Sect. 25 enacts that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

It was argued that sect. 25 recognises power in the company to accept a partial payment as a cash payment in full, provided there be a contract to that effect duly executed and filed with the registrar. I am unable so to construe the clause. I do not think its object was to give companies new powers in relation to the issue of their shares, but to regulate the statutory powers already possessed by them in regard to the acceptance of other than cash payments as part of their capital. The expression "unless the same shall have been otherwise determined" does not, in my opinion, imply that part payment may be accepted as payment in full. It refers to contracts so far as then lawful, by which a company might agree to accept considerations other than cash. In all such cases, the clause provides that the contract, if not duly filed with the registrar, shall be of no effect, and that the shareholder shall remain liable for the value of his shares in money. The obvious purpose of the enactment is to enable persons dealing with the company to judge for themselves what may be the value of the consideration given as representing capital.

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It is admitted that the appellants acted in good faith, and that the arrangement made with them would, even if carried out to the letter, have been of solid advantage to the company. But they accepted shares of the nominal value of 20*s.* as fully paid up, in the knowledge that only 5*s.* per share had been paid; and they cannot, therefore, benefit by the principle recognised by this House in *Waterhouse* v. *Jamieson* (1) and *Burkinshaw* v. *Nicolls* (2).

It was urged at the bar that the appellants could have secured by other means all the advantages which were stipulated in their contract with the company; that, instead of 20*s.* shares, the company could have issued 5*s.* shares fully paid, bearing a preferential dividend of 40 per cent., and participating in the remaining profits equally with its ordinary 20*s.* shares; or that the appellants might themselves have bought the goods purchased with their contributions, and received in exchange 20*s.* shares fully paid up. I see no reason to doubt that the first of these courses might have been successfully adopted; but I am not certain that the second would have been a legitimate proceeding, seeing that it might have involved acceptance by the company of goods in lieu of cash, at an estimated price of no less than four times their actual cost. It is needless, however, to consider what the parties might have done, if that which they did is not of legal effect.

In my opinion, therefore, the register of the company is erroneous, in so far as it bears that these additional shares have been fully paid up; and the order appealed from, which merely provides for its correction in that respect, ought to be affirmed.

I have had an opportunity of considering the suggestions to be made by my noble and learned friend Lord Herschell. I agree with him that the original shareholders had undoubted power to resolve that no call should be made upon the new shares except in liquidation, and then only for the purpose of paying debts and expenses of liquidation, because that power is expressly conferred upon limited companies by sect. 5 of the Companies Act 1879 (42 & 43 Vict. c. 76). That the original shareholders could be held, in the present case, to have resolved

(1) Law Rep. 2 H. L., Sc. 29. (2) 3 App. Cas. 1004.

to that effect, is by no means so clear a proposition; because it appears to me to raise the question whether a single resolution, that no money shall be paid in any event, is severable into two distinct resolutions, one to the effect that there shall be no payment, and the other to the effect that there shall be payment on the occurrence of a certain event. Seeing that the question has not been argued either in the Courts below or in this House, I abstain from expressing any opinion upon it.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL:—

My Lords, this case raises the important question whether a company incorporated with limited liability can issue its shares at a discount.

[His Lordship then stated the facts given above.]

The question whether there was power to issue the shares depends mainly upon the construction of the 8th and 38th sections of the Companies Act 1862, though the 25th section of the Companies Act 1867 has also a material bearing upon it. By the 8th section of the Act of 1862 it is enacted that in the case of a company limited by shares the memorandum of association shall contain "the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount." The 38th section of the same statute provides that in the event of a company formed under the Act being wound up, every present and past member should be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with (amongst others) this qualification, that in the case of a company limited by shares, no contribution should be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

It is contended that these two enactments taken together preclude a company from issuing shares as fully paid up in

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respect of the payment of a sum less than the nominal amount of the share—that is to say, that a person taking a share on those terms, if he remains a shareholder, is liable to pay the difference between the amount he has already paid and the nominal value of the share. If it had been determined that under the Companies Act a shareholder was in all cases liable to pay the whole of the nominal value of a share in cash, I should have had less difficulty in adhering to the judgment of the Court below. But the contrary has been determined. And not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the Courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the share. The transactions which have taken place on this view of the law have been so numerous, and have extended over so long a period of years, that I doubt if it would have been possible for your Lordships to adopt a different view now, even if the legislature had not intervened. But I think that the legislature has distinctly recognised and given its sanction to these decisions.

The 25th section of the Companies Act 1867 provides that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. I quite agree that this enactment does not purport to render valid an issue of shares in respect of something other than full cash payment, in case it would have been invalid under the Act of 1862. But it seems to me distinctly to recognise the validity of such a transaction, imposing only the condition that the contract determining that payment is not to be made in cash shall be in writing and duly filed. The object of this is obvious. It is to enable any creditor, by reference to the documents at the office of the Registrar of Joint Stock Companies, to ascertain how much of the liability on the shares which does not remain undischarged has been discharged by cash payment, and how much in some other way. A creditor has not the

right to assume that so much of the amount of the share as is no longer liable to be called up has found its way in the shape of cash into the hands of the company. But he has placed at his disposal the means of full information on the subject.

Having regard to the considerations to which I have called attention, and notably to the provisions of the Act of 1867, I do not feel so much impressed as some of your Lordships by the mischiefs which it is contended would result from the decision that shares might be issued as fully paid up in consideration of a payment less in amount than their nominal cash value, and I can conceive many cases in which such a course would be advantageous both to shareholders and creditors. But the matter must, after all, be determined by an examination of the language of the Act of 1862, bearing in mind, of course, the decisions upon it, and the subsequent legislation, which, as I think, sanctioned and acted on those decisions.

I cannot myself place any great weight on the requirement of sect. 8, that the amount of capital with which the company proposes to be registered is to be divided into shares "of a certain fixed amount." The provision was, of course, necessary in introducing a scheme of limited liability. But it does not, of itself, determine anything as to the extent of liability. Had it stood alone, the shareholders would have been liable, on general principles, to the extent necessary to discharge all the obligations of the industrial partnership. The limitation of liability arises from the provision of sect. 38, that in case the company is wound up an individual shall only be liable "to the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." This must be regarded as by implication enacting that he shall be liable to that extent. What, then, is the meaning of the "amount unpaid" on the shares? If it had been the law that taking shares in a limited liability company necessarily involved the payment in cash of the nominal amount of the share, the answer would have been free from difficulty. The words "the amount unpaid" would have been taken in their ordinary sense as meaning so much as has not been paid in cash. But it is impossible now to adopt that interpretation as applicable to every case.

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The Acts of 1862 and 1867 must be read together. And the latter statute prescribes that a share shall be deemed to be held subject to the payment of the whole amount thereof in cash, unless "the same shall have been otherwise determined" by a filed contract. What is "the same"? Clearly, as it appears to me, that the share is held subject to the payment of the whole amount in cash. When, then, it has been lawfully "otherwise determined," it appears to me impossible that the words "the amount unpaid" can have their ordinary meaning. They must, at least, be interpreted as meaning "unpaid, or not otherwise satisfied, in accordance with the provisions of a filed contract." And once this conclusion is arrived at, I do not think there would be any insuperable difficulty in including within them the case where, in consideration of a certain payment, the liability had been by a filed contract entirely discharged.

At the same time, I am quite sensible of the force of the argument that in the 25th section of the Act of 1867 the emphatic words are payment "*in cash*," implying that there must be payment in some form, even though it is not to be made in cash. And whilst goods or services given or taken in lieu of payment in cash may be regarded as in a sense payment, it is difficult to say that payment of a portion of a sum is payment of the whole. Although, therefore, my mind has not been free from doubt, I am not prepared to differ from the Court below, and from those of your Lordships who entertain that view, in thinking that a company cannot issue its shares at a discount so as to exonerate those taking the shares from the liability, in case the company be wound up, to pay the amount not already paid on the shares.

But the question before your Lordships does not arise in the case of a winding-up. The interest of the creditors is not in issue. The action is brought by a shareholder avowedly for the purpose of benefiting the holders of the ordinary shares at the expense of these who are possessed of the preference shares, which were taken on the express condition that their holders should not be required to pay more than 5*s.* per share. To accede simpliciter to the prayer of the plaintiff would, as it seems to me, be to sanction a violation by the company of a solemn agreement entered into between them and those who took the shares. I

should have thought it was wrong to do this, except in so far as the contract provides for that which has been otherwise provided for by the legislature. In so far as the obligations arising under the contract do not involve a contravention of any enactment of the legislature, I see no reason why they should not be given effect to. The point was not argued at the bar in the present case, but I will give my reasons for the opinion I have expressed. Except when the legislature has expressly or by implication forbidden any act to be done by a company, their rights must be governed by the ordinary principles of law, and they are free to make, as between them and their shareholders, such contracts as they please. They may enter into any undertaking with those who are invited to become shareholders as to the terms on which the shares shall be taken, and as to the rights of the respective shareholders inter se. What they cannot do is to exclude the liability, in case the company is wound up, to contribute to the extent unpaid on the shares for the benefit of the creditors. But what is to prevent the company agreeing that, except in so far as the legislature has imposed the liability, they will not enforce any? Supposing the agreement had been in terms that the company would not enforce the payment of more than 5*s.* per share, except in the case of a winding-up, and then only to satisfy the claims of creditors and the costs of the winding-up, would there have been anything illegal in such an agreement? I fail to see anything in the Companies Acts which would render such an agreement invalid. And taking the contract between the company and the shareholders, and the enactment together, is not this, in effect, what has been done? I am, of course, assuming that to issue shares on such terms would be within the memorandum of association. There can be no doubt of that in the present case. It is provided that the original or increased capital may be issued with "such preference, privilege, guarantee, or condition" as the company may direct.

Whilst, then, I think it ought to be declared that the agreement between the company and those to whom the preference shares were allotted was ineffectual to absolve them from the liability prescribed by the 38th section of the Act of 1862, I should have thought, had the point been insisted upon, that it

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ought also to be declared that the company are not entitled to call upon such shareholders for any further payment beyond that agreed upon, except in the case of a winding-up, and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding-up.

LORD MACNAGHTEN:—

My Lords, your Lordships are called upon to determine whether it is or is not competent for a company limited by shares to issue shares at a discount so as to relieve persons taking shares so issued from liability to pay up their amount in full. It was suggested that different considerations might apply to shares in the capital with which a company is originally registered and shares in additional capital created afterwards. But it seems to me to be perfectly clear that, for the present purpose, no distinction can be drawn between one portion of the capital of a company limited by shares and another.

The question turns upon the construction of the Companies Act 1862. The provisions of the Act are, I think, plain enough if one bears in mind the condition of things which existed before the principle of limited liability was introduced in 1855. Before that time there was no way known to the law by which persons trading in partnership could restrict their liability. They were liable to the uttermost farthing. At last the legislature intervened and authorized persons who proposed to trade in partnership to form themselves into a registered company with a declared capital and shares of a fixed amount, and then limited the liability of the partners as members of the company to the amount unpaid upon their shares.

But all this legislation proceeds on the footing of recognising and maintaining the liability of the individual members to the company until the prescribed limit is reached. The memorandum of association of a company limited by shares must contain "the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount." It must also contain "a declaration that the liability of the members is limited." Neither the liability nor the limitation is defined in the memorandum itself. And so the declaration carries you

back to the earlier part of the section, where you are told what is meant by "a company limited by shares." It is a company "formed on the principle of having the liability of its members limited to the amount unpaid upon their shares." That must mean that the liability of a member continues so long as anything remains unpaid upon his shares. Nothing but payment, and payment in full, can put an end to the liability.

Plainer still and more explicit is the section headed "Liability of members." It begins by declaring that, in the event of a company formed under the Act being wound up, the measure of the liability of every present and past member is the amount required to satisfy all claims of creditors, to pay all the expenses of liquidation, and to adjust the claims of members inter se. Then come certain qualifications to which that liability is subject. One is, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

To sum the matter up, I cannot, I think, do better than adopt the language Mr. Buckley has used in speaking of the Limited Liability Acts. "The dominant and cardinal principle of these Acts," he says, "is that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit." Whether this liability is one of "the conditions of the memorandum," within the meaning of that expression in the Act of 1862, as Lord Selborne seems to have thought (*Dent's Case* (1)), or a condition attached by the Act to a company limited by shares and of the essence of such a company, though it may not be found contained within the four corners of the memorandum, is a matter of little or no importance. In either view of the case it is plain that the condition is one which cannot be dispensed with by anything in the articles of association, or by any resolution of the company, or by any contract between the company and outsiders who have been invited to become members of the company and who do come in on the faith of such a contract.

If this conclusion be correct, there is, I think, an end of the

(1) Law Rep. 8 Ch. 768.

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question, and the arguments urged on behalf of the appellants may be disposed of very briefly.

I may notice, in the first place, that reference was made in the course of the argument to sect. 25 of the Act of 1862, which specifies, among the particulars to be entered on the company's register of members, the amount "paid, or agreed to be considered as paid," on the shares of each member. It was suggested that this expression shews that the statute does not require actual payment. Nor does it, except in the case of a company limited by shares. The section, it will be observed, is speaking not only of such companies, but of all companies under the Act which have a capital divided into shares.

The next argument that was put forward strikes me as rather far-fetched. It was said that companies under the Companies Clauses Acts are authorized to issue new shares at a discount. It was pointed out that the language of Table A, in reference to the issue of shares in additional capital, is precisely the same as the language of the Companies Clauses Act 1863, now that it has been amended by the Railway Companies Act 1867, and the Companies Clauses Act 1869, so as to make the issue of shares at a discount permissible. Why, it was asked, should there be any difference in this respect between the two classes of companies? Why should that be taken to be prohibited in the one which is allowed in the other? Well, there is this difference to start with. A company limited by shares selects its objects and fixes the amount of its capital to suit itself; complying with the provisions of the Companies Acts it is under no outside control in these matters. The Companies Clauses Acts are applicable to companies formed for the purpose of carrying out undertakings of a public nature. After Parliament is satisfied that the proposed undertaking will be of public benefit, and that the proposed capital is adequate and not excessive, a special Act is obtained. Then if the company comes for powers to raise further capital, it is open to the legislature, if it thinks fit, when sanctioning an Act for the purpose, to incorporate with the special Act the Companies Clauses Act 1863, and at the same time to modify its provisions as occasion may require. Because a special permission granted on consideration of the particular

circumstances of the case is free from objection, it does not follow that a general licence might not be open to grave abuse. There is this difference too: A company limited by shares may borrow as much money as it can get. A company under the Companies Clauses Acts has only limited powers of borrowing. So there is the more reason that a company of the latter class having still some credit, though its borrowing powers be exhausted, should be allowed in a proper case to make use of its unissued capital. But, after all, the real answer to any argument or appeal founded on the Companies Clauses Acts is this: Whatever those Acts may prohibit or permit, Table A must be taken in connection with the Companies Act 1862, and cannot be read so as to contravene its provisions.

Much reliance was placed on the 25th section of the Act of 1867. It was said that what that section has in view is one of two things, either liability to pay in cash the whole amount of the shares, or else a contract in writing duly registered at or before the issue of the shares. It was argued that if there be a contract duly registered the section does not impose any liability to pay in full. That is quite true, and for this reason: the section applies not only to companies limited by shares, but to all companies under the Act of 1862 having a capital divided into shares. In the case of a contract duly registered the section does not require payment where payment is not required by the Act of 1862. On the other hand, it does not dispense with payment in full where the liability to pay in full is a condition imposed by the Act of 1862, as it is in the case of a company limited by shares.

Burkinshaw v. *Nicolls* (1) was pressed into the argument. But all that case decides is, that the company's certificate to the effect that shares are fully paid is, as against the company, conclusive evidence of payment in the hands of a purchaser for value without notice.

Lastly, it was said that if it be the case that, in companies limited by shares, members are liable to pay up in full the amount, if any, unpaid upon their shares, still the liability is one that may be easily evaded. And it was pointed out that, in the present case,

(1) 3 App. Cas. 1004.

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if only a different method had been adopted, a result practically the same might have been attained, and then the transaction would have been unimpeachable. Whether that is a good reason for permitting the requirements of an Act of Parliament to be contravened may, perhaps, be doubted.

But I desire to protest against some of the propositions which were advanced in connection with this part of the argument. It was said that if a company limited by shares owes its bankers £1000, and its shares are at 50 per cent. discount, fully paid shares of £2000 nominal value may be given in discharge of the debt. It was said that a company limited by shares may issue fully paid shares at their market price at the time, however much they may have become depreciated, in exchange for goods having a recognised market value. Speaking for myself, I am not prepared to assent to either of those propositions without further argument. I am inclined to agree with the view expressed by Cotton, L.J., though it is not necessary to decide the point. It seems to me that all that has been determined so far is that the Court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price for their property.

In the present case, I regret that I am compelled to say that in my opinion the transaction cannot stand. The course which the directors took probably saved the company. All parties concerned acted in a perfectly open and honest manner. But it seems to me that the requirements of the Companies Act 1862 have been contravened, and, therefore, I think that the appeal must be dismissed.

LORD MORRIS:—

My Lords, the Act of 1862 enabled a company to be formed on the principle of having the liability of its members limited to the amount unpaid on their shares; it did not impose a liability —on the contrary, it limited liability to the extent of the amount of the share; but there is no power given that I can see to further limit liability by not paying that amount. Has that position been varied by sect. 25 of the Act of 1867, which provides, "Every share in any company shall be deemed and

taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares"? That section appears to me plainly to refer to and deal only with the mode of payment—primâ facie, the payment of the whole amount is to be in *cash*, but with a power given of contracting for something other than cash to be taken in payment, but payment in meal or malt is clearly contemplated—the amount of the shares must be paid. A company can only do what it is authorized to do, and not that which it is only not prohibited from doing. I can find no authothority to issue a pound share but that only 5*s.* is to be paid of the pound.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

Lord Halsbury L.C.:—

My Lords, before putting the question, I only desire to add that I have designedly avoided alluding to the point which has been mentioned by my noble and learned friend Lord Herschell, inasmuch as it was neither insisted upon nor argued at the bar.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 14th March 1892.

Solicitors for the company: *Snell, Son & Greenip.*
Solicitors for Wallroth: *Freshfields & Williams.*
Solicitors for Roper: *Batten, Proffitt, & Scott.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1892 March 14.

ALEXANDER TENNANT . . . . . APPELLANT;

AND

ROBERT SINCLAIR SMITH (SURVEYOR OF TAXES). . . . . RESPONDENT.

Revenue—Income Tax—Occupation of Bank Premises by Agent—Abatement—Acts 5 & 6 Vict. c. 35, ss. 100, 146, Schedule D, Case ii. rule 2, and Case 6, Schedule E, rule 6; 16 & 17 Vict. c. 34, s. 2; and Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), s. 8.

By the Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), s. 8, it is provided that any person assessed to income tax who proves that his "total income from all sources" is less than £400 shall be entitled to be relieved from the duty on £120 of such income.

The appellant claimed relief under the above section on the ground that his income was less than £400. It appeared that he was agent for a bank, and was bound as part of his duty to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours. He was not entitled to sublet the bank house or use it for other than bank business, and, in the event of his ceasing to hold his office, he was under obligation to quit the premises forthwith.

Held (reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 428)), that in estimating the appellant's total income from all sources, the yearly value of his privilege of free residence in the bank premises could not be brought into account.

APPEAL from an interlocutor of the Court of Session sitting as the Court of Exchequer in Scotland, dated the 22nd of January, 1891, upon a special case.

The facts here given are taken substantially from Lord Watson's opinion.

Alexander Tennant, the appellant, was agent for the Bank of Scotland at Montrose, and in that capacity he resided in part of the bank's business premises, in circumstances and under conditions precisely similar to those which this House recently considered in *Russell* v. *Town and County Bank* (1), namely, that he was bound, as a part of his duty, to occupy the bank

(1) 13 App. Cas. 418.

house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours; that he was not entitled to sublet the bank house, or to use it for other than bank business, and in the event of his ceasing to hold his office, he was under obligation to quit the premises forthwith. The appellant had a yearly salary from the bank of £300, and income from two other sources amounting to £74. His total income was therefore £374.

Having been charged with duties upon that income, under Schedules D and E, for the year ending the 5th of April, 1890, the appellant claimed an abatement in terms of sect. 8 of the Customs and Inland Revenue Act, 1876, which enacts that a person who shall duly prove that his "total income from all sources," although amounting to £150 and upwards, is less than £400, shall be entitled to be relieved from so much of the said duties assessed upon or paid by him as an assessment or charge upon £120 of his income would amount to. The same section exempted from duty persons whose total annual income is less than £150.

The claim was not admitted by Robert Sinclair Smith, the respondent, surveyor for the district of Brechin, upon the ground that, in estimating the appellant's total income from all sources, there ought to be added to the items already mentioned the sum of £50, as representing the yearly value to the appellant of his privilege of residence in the bank buildings. The district commissioners having on appeal allowed the abatement, the respondent obtained and submitted a case to the Second Division of the Court of Session, who, being equally divided in opinion, took the assistance of three judges of the First Division. The result was that the late Lord President (Inglis), the Lord Justice Clerk, and Lords Rutherfurd Clark and McLaren decided against the appellant, Lords Young, Adam, and Trayner dissenting (1).

On appeal,

Feb. 15, 16. Sir *Horace Davey, Q.C.*, and *Guthrie* (of the Scotch Bar), for the appellant:—

The appellant occupies his residence on behalf of the bank.

(1) 18 Court Sess. Cas. 4th Series (Rettie), 428; 28 Scotch Law Rep. 307.

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Russell v. *Town and County Bank* (1) is clearly in the appellant's favour. This House held there that the dwelling-house occupied by the bank manager was part of the bank premises, and used for purposes of the business.

For the appellant's case it is not of importance whether the assessment is taken under Schedules D or E, for he comes under neither. Schedule D of the Income Tax Code (5 & 6 Vict. c. 35, s. 100; 16 & 17 Vict. c. 34, s. 2) imposes the tax on the annual amount of the profits and gains; and case 2, rule 2, of the Act of 1842: "The duty to be charged shall be computed at a sum not less than the full amount of the balance of profits, gains, and emoluments": Dowell, 3rd ed., p. 118. In order to rely on the word "emolument," it must be shewn that the emolument is something of money's worth, or capable of producing money; but no money can be obtained by the appellant for this benefit of free residence. The bank manager is required to sleep on the premises as a safeguard against robbery. He is as much on duty as if he were in the counting-house of the bank. He cannot leave without permission of his superiors; and when he does, another person is put in his place. In the case of Lambeth Palace it could not be said that residence there was a source of income to the Archbishop of Canterbury; nor could it be said in the cases of the captain of a ship occupying his cabin, or that of a domestic servant, housekeeper, or butler, living in their master's house, that either of these persons were liable to the tax. The tax is to be charged on profits and gains, and not upon what an individual may be able to save by holding a particular office.

Lord McLaren and the late Lord President suggest that there might be income which is not assessable: (*Brooks* v. *Colquhoun* (2),) and yet which ought to be taken into account in considering whether an abatement could be allowed. But it is difficult to understand why income should mean one thing for the purposes of abatement, and another thing for the purposes of taxation. Lord Young put the true test: Is the accommodation which the manager has in the bank premises to be added as part of his income within the purposes of

(1) 13 App. Cas. 418. (2) 14 App. Cas. 493.

these Acts, or is it part of his vocation, in return for which he receives his salary?

By Schedule E (Act of 1842), the duty is to be paid on all "salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of" the person's office or employment: Rule 1. Which are to be *payable*. Then Rule 4 enacts that the perquisites to be assessed under the Act shall be deemed to be such profits of office and employment as arise from "fees or other emoluments, and *payable* by the Crown or by the subject" in the said office. So that the expression "perquisites" is defined as being the same as emolument. Rule 6 provides, that the duty chargeable shall be detained and stopped out of such salaries, &c., or out of any other money "which shall be *paid*" or *payable* "upon such or for arrears": Dowell, 3rd ed., pp. 166, 167. But there could not be an arrear of this advantage. The appellant cannot turn this advantage or benefit into money; therefore, it is not an emolument under Schedule D, nor a perquisite under Schedule E.

The Lord Advocate (Sir *Charles Pearson*, Q.C.) and the *Solicitor General for Scotland* (*A. Graham Murray*, Q.C.), for the respondent:—

The case falls under Schedule D, case 2, rule 2. The word emolument has a different meaning in Schedule D to what it has in Schedule E. It cannot be said to be unfair that a person should be scheduled under Schedule E as regards salary, and under Schedule D in respect of emoluments. It may be that the whole of the emoluments are not satisfied by the rules under Schedule E. It is then necessary to have recourse, either in part or whole, to Schedule D.

[LORD MACNAGHTEN:—Sect. 155 appears to provide that nothing but money shall be stopped in the hands of the employer.]

The expression "profits" in the Income Tax Acts must include everything which makes an office or employment more valuable.

Sir *Horace Davey*, in reply:—

In *Russell* v. *Town and County Bank* (1), it was contended by

(1) 13 App. Cas. at p. 422.

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the Crown that, under similar circumstances, the duty could not be assessed upon the manager of a bank. It is impossible to take into consideration the particular circumstances of the appellant: *Bent* v. *Roberts* (1) must be taken to have decided that a person in the position of the appellant is not liable to income tax under Schedules A or B.

Judgment, after consideration.

LORD HALSBURY L.C.:—

My Lords, to put this case very simply, the question depends upon what is Mr. Tennant's income. This is an Income Tax Act, and what is intended to be taxed is income. And when I say "what is intended to be taxed," I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said, in *In re Micklethwait* (2), "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

Now, it is certainly true that the occupation of a house rent free is not income. Of course the possession of a house which may be used for purposes of profit, is property and taxable as such. But the bald, dry proposition that the mere fact of occupying a house, which house as property is already taxed, is

(1) 3 Exch. D. 66.

(2) 11 Ex. at p. 456.

not income in any sense, could, I think, hardly be disputed. For my own part, I doubt very much whether a house could ever properly be described as part of a man's income, though, doubtless, the rent for it when received would be income in the hands of the person receiving it.

Another observation that occurs to me is, that in dealing with real property the whole framework of the statute seems to point to a peculiar kind of assessment while treating the things themselves as the subjects of assessment; and the provisions which give effect to that peculiarity of assessment are entirely distinct from the provisions as to income.

Now, Mr. Tennant occupies this house without paying any rent for it. It may be conceded that if he did not occupy it under his contract with the bank rent free, he would be obliged to hire a house elsewhere, pay rent for it, and pro tanto diminish his income. And if any words could be found in the statute which provided that besides paying income tax on income, people should pay for advantages or emoluments in its widest sense (such as I think the word "emoluments" here has not, for reasons to be presently given), there is no doubt of Mr. Tennant's possession of a material advantage, which makes his salary of higher value to him than if he did not possess it, and upon the hypothesis which I have just indicated would be taxable accordingly.

But, upon the principles to which I at first referred, your Lordships are to ascertain not whether Mr. Tennant has got advantages which enable him to spend more of his income than if he did not possess them, but whether he has got that which any words in the statute point out as the subject on which it imposes taxation.

Now, I agree with Lord Adam in his very lucid judgment, that what Mr. Tennant is to be assessed upon must be assessed under Schedule E, and I agree with the criticisms which he applies to the words within which, if at all, this advantage of occupying a house rent free must be brought, and none of the words, either "perquisites," "profits," or "emoluments," are properly applicable, inasmuch as by the rule in which those words are used or explained the word "payable" as applied to

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them renders it to my mind quite impossible to suppose that the mere occupation of a house is reconcilable with the just application of that word.

I come to the conclusion that the Act refers to money payments made to the person who receives them, though, of course, I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's worth and be therefore taxable.

The illustration given in the argument of the mode of arriving at a trader's profits, and the mode of treating his stock-in-trade, suggests that money's worth may be treated as money for the purposes of the Act in cases where the thing is capable of being turned into money from its own nature.

I have designedly avoided considering the question whether in any sense the occupation of this house is a benefit or a burden to the recipient of the advantage or disadvantage, whatever it may be, though I doubt very much whether such considerations on the one side or the other are relevant to the question which your Lordships have to determine. I am aware that it has the high authority of the late Lord President, and his Lordship undoubtedly treated the question as, if it were established to be a clear pecuniary benefit it would be taxable, whereas, if it were a heavy burden it would not. Nor did his Lordship shrink from suggesting that this occupation of a house rent free would be taxable or not, according as it was unsuitable for the occupant's domestic arrangements or the reverse. It followed, therefore, that in every case where such a question arose it would be necessary to examine the particular circumstances of each man's family. If he had a large family that could not be accommodated in the house, and he must hire a house elsewhere, one result would follow. If he was a bachelor, and the house was appropriate to his wants, then another result would follow.

I cannot think that the legislature ever contemplated such an examination or discrimination of persons subject to taxation as such a system of assessment would imply. Nor do I understand upon what principle the inquiry could properly be directed. The money a man has been compelled to spend for the maintenance of his wife and family, if he has them, has not the less formed

part of his income. The fact that he is compelled to spend on this or that subject of expenditure does not make the money that he has had to spend the less his income because he has had to spend it. The example given by Lord Young, on the other hand, of a man who is saved by the form of his occupation as a sea captain from the necessity of hiring a house, is a very cogent and striking illustration to what extreme views such an interpretation of the Act would lead.

I observe both the Lord President and the Lord Justice Clerk used the phrase "gains" as applicable to the advantage which Mr. Tennant derives from the occupation of the house. That seems to be a reference to Schedule D, whereas, as I have already said, I concur with Lord Young and Lord Adam that Mr. Tennant's income must be assessed under Schedule E. And further, it appears to me impossible to contend that it can be assessed under both D and E, each being in terms exclusive of the other. Nor do I think that a different class of emolument can be intended to be reached under Schedule D, though the words "emoluments or gains" in Schedule D do not receive exposition from the words that occur in Schedule E.

For these reasons, I am of opinion, in the words of Lord Young, that the thing sought to be taxed is not income unless it can be turned into money. Accordingly, I think that the determination of the commissioners was right, and that the order appealed from ought to be reversed, and I so move your Lordships.

LORD WATSON (after stating the facts as substantially given above, continued):—

In ascertaining total income from all sources, with a view to the exemptions enacted by sect. 8 of the Act of 1876, I am of opinion that no income arising in this country can be taken into account which is not chargeable with duty under one or other of the income tax schedules. What may be the rule with respect to income arising in another country and not assessable here, I do not consider it necessary for the purposes of this case to determine. Accordingly, it appears to me that the case was decided in the Court below, as it has been argued at your Lordships' bar,

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upon the true legal issue—namely, whether the appellant's residence is income, within the meaning of the statutes, which must be valued and assessed for income-tax.

Schedule A, which assesses property according to its annual value, includes all lands, tenements, hereditaments, and heritages capable of actual occupation. Schedule B imposes an additional assessment in respect of occupancy, upon some of the lands and others comprehended in Schedule A, the occupation of which in itself constitutes a trade or business. The appellant is not a proprietor, neither is he an occupier within the meaning of Schedule B. The bank are the only occupiers, being, as Lord Herschell said in *Russell* v. *Town and County Bank* (1), "in the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank and the business of the bank." The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises instead of occupying a separate residence of his own.

The legislature has made elaborate provision for ascertaining the yearly value of lands, tenements, hereditaments, and heritages assessable under Schedule A, and also the yearly value of occupation falling under Schedule B; but there is no machinery to be found in any of the Income Tax Statutes for arriving at the annual value of residence as distinguished from such occupation. Yet it is manifest that the ascertainment of annual value in the latter case may be attended with greater difficulty and nicer considerations than are involved in the application of the rules for assessing and charging duties under Schedules A and B. Even according to the respondent's argument, the assessable value of a servant's residence, in premises which he does not occupy, is not the price which other persons might be prepared to pay for the privilege, but the benefit which he personally derives from it, estimated in money.

(1) 13 App. Cas. 418, at p. 426.

In the present case the learned judges of the majority have assessed the value of the appellant's residence at £50, upon the somewhat speculative footing that, if his duty did not require him to reside in the bank, he would be compelled to pay that sum for suitable accommodation for himself and family elsewhere. In that view the so-called benefit may in some instances prove a heavy burden, as in the case of a bank agent who, but for the service required by his employers, would continue to reside, free of charge, in his parents' house. I entertain very serious doubt whether, according to the scheme of the Income Tax Acts, it was intended to assess in any shape mere residence, either in performance of duty to the actual occupant or by licence from him. But I do not find it necessary to decide the point, because I am satisfied that the appellant is not liable to duty under any schedule.

I agree with your Lordships that income arising from employment as a bank agent is assessable under Schedule E in all cases where the bank which employs him is a company or society, whether corporate or not corporate, as specified in the third rule of that schedule. The Bank of Scotland being a corporation, the appellant's office is undoubtedly within the schedule. Neither is it doubtful that the appellant is liable to pay duty in respect of all "salaries, fees, wages, perquisites, or profits whatsoever" accruing to him by reason of such office, as provided by the first rule.

It is clear that the benefit, if any, which a bank agent may derive from his residence in the business premises of the bank is neither salary, fee, nor wages. Is it, then, a perquisite or a profit of his office? I do not think it comes within the category of profits, because that word, in its ordinary acceptation, appears to me to denote something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in other words, money—or that which can be turned to pecuniary account. If the context had permitted, it might have been possible to argue that a benefit of that kind was a perquisite. But the fourth rule of Schedule E defines perquisites, for all purposes of the Act, to be "such profits of offices and employments as arise from fees and other emoluments, *and payable either by the Crown or by the subject* in the course of executing such offices or employments."

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It was argued, however, that, if not liable under Schedule E, the appellant was, at all events, liable under Schedule D. I do not think it can be reasonably maintained that a public office or employment assessable under Schedule E is also liable to assessment as an employment or vocation within the meaning of Schedule D. No doubt that schedule also includes all "other profits and gains not charged by virtue of any of the other schedules contained in this Act." But it appears to me that everything in the shape of profit or gain arising from a public office or employment, which the Legislature intended to be chargeable with duty, is ascertainable and assessable under the rules of Schedule E and under these rules only. The profits and gains arising from public offices and employments are in no sense profits and gains not charged by virtue of schedules other than Schedule D.

There is a clause in the Act of 1842 (sect. 188) which enacts that "every provision in this Act contained, and applied to the duties in any particular schedule, which shall also be applicable to the duties in any other schedule, and not repugnant to the provisions for charging, ascertaining, or levying the duties in such other schedule shall, in charging, ascertaining, and levying the same, be applied as fully and effectually as if the application thereof had been expressly and particularly directed." The respondent did not rely in argument upon the terms of that clause, the construction of which is by no means free from difficulty. Thus far its terms are clear enough. The provisions of Schedule D with respect to employments and vocations are not to be applied to offices and employments under Schedule E, unless they are in the first place "applicable" to such offices and employments, and, in the second place, not repugnant to the rules of assessment enacted for Schedule E. Assuming for the sake of argument that the rules of assessment for employments and vocations under Schedule D differed in material respects from the rules for assessing public offices and employments under Schedule E, I do not think they would be applicable to cases falling under Schedule E, or could be applied without repugnancy, or, in other words, without abrogating pro tanto the rules of Schedule E.

I think it right to add that, in my opinion, the result would not be different if the rules of Schedule D were applied to the appellant's so-called benefit of residence.

In that case the appellant would be chargeable upon the full balance of "the profits, gains, and emoluments" accruing to him from his employment as bank agent. Having regard to the general scheme and context of the Act, I am unable to come to the conclusion that these words "profits, gains, and emoluments" of a private employment as bank agent under Schedule D were meant by the legislature to include more than the "salaries, fees, wages, perquisites, or profits whatsoever," accruing to a similar employment by a public company. In my opinion, the word "emolument" occurring in the rules of Schedule D means some more tangible benefit than a servant's residence in his master's house, or a meal or a suit of livery supplied by the master.

I, therefore, concur in the judgment which has been moved by the Lord Chancellor.

LORD MACNAGHTEN:—

My Lords, I agree.

The appellant, who is the agent at Montrose for the Bank of Scotland, being assessed for income tax, claims an abatement. The question is whether his "total income from all sources" is or is not less than £400. That depends upon whether he has to bring into account the value of a free residence provided for him by the bank in the bank premises.

Notwithstanding the opinion of one of the learned judges of the Court of Session, I think it is perfectly clear that nothing is to be brought into account on a claim to relief except what is chargeable for the purpose of assessment.

The first point for consideration is what is the meaning of the expression "total income from all sources." It certainly means more than income properly so described—it includes more than "profits and gains" chargeable under the last three schedules of charge. It includes the annual value of property chargeable under Schedule A, and the annual value of the occupation chargeable under Schedule B. The Income Tax Code

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(5 & 6 Vict. c. 35, s. 167, and 16 & 17 Vict. c. 34, s. 28) contains express directions for estimating and calculating these values for the purpose of ascertaining the title to abatement when relief by way of abatement is claimed. But it contains no directions for estimating or bringing into account any benefit, or advantage, or enjoyment derived from lands, tenements, hereditaments, or heritages, which does not come under Schedule A or Schedule B.

The next point to be considered is what is the nature of the appellant's occupation of the residence provided for him in the bank premises. From the case stated for the opinion of the Court of Exchequer in Scotland it appears that "the appellant is bound, as part of his duty, to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours." He is not entitled to sublet the bank house or to use it for other than bank business, and in the event of his ceasing to hold his office he is under obligation to quit the premises forthwith. Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Schedule A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay.

Then this question suggests itself, Has not the Crown got all that it is entitled to in respect of this house when it has received the duty on its full annual value? Is not the notion of finding some subject for taxation in lands, tenements, hereditaments, or heritages, over and above the full annual value chargeable under Schedules A and B, a fanciful notion and foreign altogether to the scope and intent of the Income Tax Code? The learned counsel for the Crown say no. Their case is that the benefit derived by the appellant from his occupation of the bank house is chargeable under Schedule E, or, at any rate, under Schedule D.

I do not doubt that the occupation of the bank house rent free, though not unattended with some inconveniences, is, on the whole, a considerable advantage to the appellant. It is a gain to

him in the popular sense of the word. Whether such a benefit or gain comes under the head of "profits and gains" chargeable for income tax purposes is the question submitted to your Lordships. I use the expression "profits and gains" because that is the term which the legislature uses as applicable to both the schedules of charge under which it is said the appellant is chargeable.

In the course of the argument the learned counsel for the Crown admitted that there was a difficulty in maintaining their claim under Schedule E. On examining that schedule it became obvious that it extends only to money payment or payments convertible into money. And so they took their stand on Schedule D.

For the purposes of this case I am willing to assume that, in assessing a person holding an office chargeable under Schedule E, the Crown may resort to Schedule D in order to reach gains or profits arising or accruing from his office which, for some reason or another, do not come within the letter of Schedule E. The third paragraph of Schedule D imposes the duty in respect of all profits and gains not charged by virtue of any of the other schedules. It seems to me, therefore, that if the privilege of occupying the bank house rent free is really a profit or gain within the meaning of the Income Tax Code, and if it is not chargeable under Schedule E, it might be caught by Schedule D —not, I think, under case 2, rule 2, on which the Crown mainly relied, but under case 6. Case 2, rule 2, is, I think, inapplicable because it only extends to the duty to be charged in respect of employments not contained in any other schedule. Case 6 goes much further. It gives effect to the third paragraph of Schedule D, and extends to the duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules and not charged by virtue of any of the other schedules.

In my opinion the answer to the claim of the Crown does not depend on any minute criticism of the language of the different schedules. The real answer is, that the thing which the Crown now seeks to charge is not income, nor is it required to be taken into account as income for the purpose of ascertaining title to

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relief by way of abatement. It falls neither under Schedule A nor under D or E. I have already dealt with Schedule A. Under that schedule the duty is payable on the "annual value." The duty under Schedules D and E is payable on the "annual amount." It is a tax on income in the proper sense of the word. It is a tax on what "comes in"—on actual receipts. Take, for example, the 6th case of Schedule D, which sweeps in all profits or gains not otherwise chargeable. What the person liable to be assessed is required to do under Schedule G is to return "the full amount" of annual profits "received" (5 & 6 Vict. c. 35, s. 190, Schedule G, XII.). No doubt if the appellant had to find lodgings for himself he might have to pay for them. His income goes further because he is relieved from that expense. But a person is chargeable for income tax under Schedule D, as well as under Schedule E, not on what saves his pocket, but on what goes into his pocket. And the benefit which the appellant derives from having a rent-free house provided for him by the bank, brings in nothing which can be reckoned up as a receipt or properly described as income.

For these reasons I am of opinion that the appeal must be allowed.

LORD MORRIS:—

My Lords, I concur in the judgment which has been moved.

LORD FIELD:—

My Lords, I also concur in the judgment that the appeal should be allowed and the decision of the commissioners restored. For the reasons which have been so fully indicated to your Lordships it appears to me that the residence of the appellant upon the bank premises, which although rent free could not in any way be converted by him into money or money's worth, cannot be held to be either a gain, profit, perquisite, or emolument, within the meaning of the statutes.

LORD HANNEN:—

My Lords, the question for consideration is whether the appellant is entitled under the Customs and Inland Revenue

Act, 1876, s. 8, to an abatement on the amount of income on which he has been assessed, on the ground that his total income from all sources is under £400. His undisputed income is £374; if to this should be added the annual value of the house he resides in rent free, his assessable income exceeds £400, otherwise not.

The appellant is agent for the Bank of Scotland at Montrose. He is bound as part of his duty as such agent to live in the bank house as custodier of the whole premises, and to transact business there after bank hours. He cannot temporarily vacate the house without special consent of the directors, and he cannot sublet or use the premises for other than bank business. Is such an occupation as this to be regarded as a part of the appellant's income? It certainly does not come within the natural meaning of the word "income." It saves the appellant from the expenditure of income on house rent, but it is not in itself income. That it is a suitable residence for the appellant is an accident which ought not to affect the determination of a question of principle as to the incidence of taxation. The income tax is imposed, not on the personal suitableness of a man's surroundings, which must vary with each man, and with the same man in different circumstances, but on his income capable of being calculated. The appellant occupies the bank house as a part of his duty, and I do not see how the case can be distinguished from that, so aptly put by Lord Young, of the master of a ship who is spared the cost of house rent while afloat. His cabin does not on that account become a part of his income.

Different considerations would apply to the case of an agent who as part of his remuneration has a residence provided for him which he might let. That which could be converted into money might reasonably be regarded as money—but that is not the case before us.

Although the question raised on this occasion is on a claim for abatement, I think it would equally arise on an assessment under either of the Schedules D and E. For the reasons given by Lord Adam, I am of opinion that the occupation of this house does not fall within the description of "salaries, fees, wages,

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perquisites, profits, or emoluments" in the sense in which those words are used in the Act.

I think, therefore, that the judgment appealed from should be reversed, and that of the commissioners affirmed.

Interlocutor of the 22nd of January, 1891, appealed from Reversed, and the determination of the commissioners reversed by that interlocutor Restored; cause remitted to the Court of Session; the respondent to pay the appellant the costs both in this House and in the Court of Session.

Agents for the appellant: *Loch & Goodhart, for Tods, Murray, & Jamieson, W.S., Edinburgh.*

Agent for the respondent: *W. H. Melvill, Solicitor for England of the Board of Inland Revenue, for David Crole, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

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THE PERUVIAN GUANO CO. LIMITED. APPELLANTS;

AND

DREYFUS BROTHERS & CO. . . . . RESPONDENTS.

Detinue—Detention of Cargoes—Possession by Consent—Possession by Receiver—Inquiry as to Damages—Damages by Detention—Damages Due to the Law's Delay—Principle of working out Inquiry—Chief Clerk's Certificate, Variation of—Wrongdoer entitled to Deduct Expenses from Value of Goods Detained.

In an action in the Chancery Division the plaintiffs claimed delivery of cargoes of guano, an injunction to restrain the defendants from delivering otherwise than to the plaintiffs, and the appointment of a receiver. The defendants, who claimed the right to the cargoes, after the issue of the writ took possession of them under a consent order by which it was agreed that the receipt of the cargoes by the defendants should be "without prejudice to any question between the parties, and that they would keep separate accounts of their expenditure and receipts in respect of the cargoes, and abide by any order the Court should make with respect to the cargoes." An order for the appointment of a receiver was afterwards made, and to the receiver when appointed the defendants delivered the unsold cargoes and the proceeds of the cargoes they had sold. The action

was defended on the ground that the cargoes were not the property of the plaintiffs. At the hearing Bacon V.C. made a decree declaring that the plaintiffs were entitled to the cargoes, and that the defendants were not entitled to reimbursement of any expenses, and directing an inquiry "what damages had been sustained by the plaintiffs by reason of the detention of the cargoes by the defendants." On appeal this House having regard to the terms of the consent order varied the decree by declaring that the defendants were entitled to receive out of the proceeds of the cargoes payment of all sums properly disbursed by them on account of freight and landing charges, and otherwise affirmed the decree. Upon the inquiry as to damages the chief clerk found that the detention began on the arrival of the cargoes respectively at their ports of discharge, and computing the damages on the principle that the illegal detention continued until the decree of Bacon V.C., allowed interest at 5 per cent. upon the proceeds of the cargoes until the decree, less the interest gained in Court and paid in by the receiver. Upon a summons to vary the chief clerk's certificate:—

Held that the former decision of this House was consistent with the order for the inquiry as to damages; that the consent order did not convert an unlawful into lawful detention, but that after the order for the appointment of a receiver the cargoes were in the possession of the Court and any damages suffered by the plaintiffs were due to the law's delay and not to any wrongful act of the defendants; that interest at 5 per cent. ought therefore to be allowed until the order for the appointment of a receiver but not after. The decision of Kay J. (42 Ch. D. 66) and of the Court of Appeal (43 Ch. D. 316) varied accordingly.

By Lords WATSON and MACNAGHTEN:—On general principles and independently of the terms of the consent order the defendants though they had illegally detained the plaintiff's property were entitled to repayment of the expenses properly incurred by them on account of freight and landing charges (See pp. 173, 186).

APPEAL from an order of the Court of Appeal (1).

The following statement of the facts is taken from the judgment of Lord Watson:—

On the 27th of April 1880 a writ issued from the Chancery side of the High Court, at the instance of Dreyfus Brothers, against the Peruvian Guano Company, and the captains of eight vessels laden with guano, which had sailed from Lobos in December 1879. The plaintiffs claimed delivery of the cargoes of these vessels; an injunction to restrain the defendant company from demanding or receiving, and the other defendants from delivering or transferring, except to the plaintiffs, the whole or any part of these cargoes; and the appointment of a receiver.

(1) 43 Ch. D. 316.

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On the 30th of April 1880 the plaintiffs moved for an injunction and the appointment of a receiver in terms of the writ; when the late Master of the Rolls pronounced an order, the defendant company, by their counsel, consenting thereto. By its terms, the action was dismissed as against the eight defendant captains; and the plaintiffs were allowed to amend their writ by extending their claim to the cargoes of three other vessels, which had been dispatched from Lobos in December preceding. The concluding part of the order, which has given rise to much controversy, and the effect of which must be again considered in disposing of these appeals, is thus expressed:—"And the Peruvian Guano Company, Limited, by their counsel undertaking that the receipt by them of the cargoes of guano in question in this action, including those to be added by amendment, shall be without prejudice to any question between the parties, and that they will keep separate accounts of their expenditure and receipts in respect of the said cargoes, and abide by any order which this Court shall make with respect to the said cargoes, or any of them, or the proceeds thereof respectively."

Of the eleven vessels whose cargoes were in dispute, two were chartered to Valencia and Bordeaux, which they reached respectively on the 11th of May and the 1st of June. Nine were destined to a port of call, and thence as ordered, to a safe port in Great Britain or Ireland, or (within certain limits) on the Continent of Europe. On arrival at their ports of call, these vessels were directed by the defendant company to their several ports of discharge, at which two arrived on the 22nd and 23rd of April, four in May, two in June, and the last of them on the 27th of July 1880.

The plaintiffs delivered their statement of claim on the 16th of July 1880, amended on the 10th of March 1881, in which they averred that the cargoes in question had been duly assigned and transferred to them by the Peruvian Government; but that the defendant company, as the vessels arrived at their ports of call or discharge, had claimed and taken possession of the cargoes as their property. They also alleged that "the defendant company had wrongfully detained all the said cargoes

from, and prevented their delivery to, the plaintiffs." In these circumstances the plaintiffs claimed (1) delivery; (2) damages for detention of cargoes; (3) if necessary and proper, an injunction; and (4) a receiver.

The company's statement of defence, delivered on the 9th of November 1880, sets forth that they were consignees for value of all the cargoes in question, under an agreement between them and the Peruvian Government, dated the 7th of June 1876, and known as the Raphael Contract. It concludes with this allegation:—"The defendant company took possession of the said several cargoes, but the defendant company denies that such possession was wrongfully taken. The defendant company denies that the said cargoes, or any of them, were or are the property of the plaintiffs, and that the company has wrongly, or in fact, deprived the plaintiffs of the use or possession thereof, and that the plaintiffs have suffered great or any damage or loss."

Then followed an amended reply by the plaintiffs, with amended rejoinder, surrejoinder, and rebutter. I shall not refer to these pleadings in detail, because they do not appear to me to alter, in any material respect, the issues raised by the statements of claim and defence; with this exception, that in their rejoinder the company took the plea that in any event they were entitled to repayment of the sums disbursed by them for freight and landing charges.

On the 17th of December 1880 the late Master of the Rolls, on the motion of the plaintiffs, ordered that a proper person should be appointed receiver, and in pursuance of that order a receiver was duly appointed upon the 23rd of February 1881; to whom the company delivered the unsold cargoes in their possession, and also the proceeds of the cargoes which they had disposed of.

The case was tried before Bacon V.C., who came to the conclusion that the plaintiffs had right to all the cargoes in question. By his formal judgment, which is dated the 13th of January 1885, the learned judge found that the Guano Company were not entitled to reimbursement of any expenses incurred by them, or in their behalf, with the exception of the expenses attending the sale of two cargoes. He directed "an inquiry what damages

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have been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in this action."

His decision was carried by the company to the Court of Appeal, where, in the course of argument, they gave up their claim to the cargoes, and merely insisted for £4 15*s.* per ton of guano, being the sum payable for commission and charges under the Raphael Contract, and alternatively for repayment of the sums actually paid by them for freight and landing charges. The majority of the Court of Appeal (Cotton and Fry L.JJ., Bowen L.J. dissenting), upon the 12th of February 1886, affirmed the judgment of the Vice-Chancellor, with costs.

The company then presented an appeal to this House, complaining of the judgments of the Courts below, in so far as these disallowed either their claim under the Raphael Contract or their actual disbursements. That part of the Vice-Chancellor's order which directs an inquiry as to the amount of damages caused by the company's detention of the cargoes was not appealed from, and was not made the subject either of argument or of comment at the Bar of the House.

This House, on the 18th of July 1887, reversed the orders appealed from, in so far as these related to the disallowance of the appellants' claims for freight and landing charges; and quoad ultra affirmed the same, subject to the declaration that the company were entitled to receive, out of the proceeds of the eleven cargoes, "payment of all sums properly disbursed by them in connection with the said cargoes, on account of freight and landing charges, with interest at 4 per cent. from the date of disbursement, so far as the same have not been already repaid to them, or allowed to them in account with the Peruvian Government (1)."

(1) The judgments delivered in this House on the 18th of July 1887 after consideration, were (omitting statements of facts and matters not relevant to this report) as follows:—

LORD WATSON:—

My Lords, the majority of the Court of Appeal were of opinion that, notwithstanding the terms of the consent order of the 30th of April 1880, the appellants must be treated as wrongdoers in receiving, landing, and holding the cargoes in question, subject to the orders of the Court. Cotton L.J. said "the appellants cannot claim as against Messrs. Dreyfus to have any lien or claim against the proceeds of these cargoes for what they paid with a view of asserting an

insisting upon the adverse title which in our opinion they have no right to." Had I been able to come to the conclusion that the payments of freight and landing charges were, in point of fact, made by the appellants eo intuitu I should, probably, have agreed with the learned Lord Justice as to the legal result. But it was matter of express agreement between the parties that the receipt of the cargoes by the appellants was not to alter or aid their position in regard to the subject matter of the action, or, in other words was not to assist their adverse title, and in these circumstances I think that their actual receipt of the cargoes must, at least, be regarded as a neutral, and not an adverse act of possession. Whether that circumstance would of itself be sufficient or not to found a claim for reimbursement, I do not think it necessary to decide.

The law of England bearing upon that question does not appear to me to be in a very satisfactory condition, and it would not be an easy task to ascertain and reconcile the principles which are supposed to govern many of the authorities cited in the course of the argument. It has, however, been decided (in my opinion rightly) that a claim such as is preferred by the appellants, will lie, if the facts of the case warrant the conclusion that there was an agreement to the effect that necessary advances were to be repaid. The agreement need not be express. It is sufficient that the respondents should by their conduct, active or passive, have created a reasonable inference that outlays necessary for the landing and safe keeping of the guano were to form a charge upon its proceeds. I am of opinion, with Bowen L.J., that the circumstances of the present case afford sufficient grounds for drawing that inference in favour of the appellants.

The Order of the 30th of April 1880 embodies the terms of a mutual arrangement between the appellants and the respondents. It was not an act of the Court causâ cognitâ. The arrangement was temporary in this sense, that it was alterable by the Court on the application of either of the parties; but, so long as it remained unaltered and was acted upon, it must govern their rights. The purpose of the arrangement was twofold, first, to eliminate from the action the captains of the eleven vessels, who had no patrimonial interest in the subject matter of the litigation, and secondly, to supersede the necessity of appointing a judicial receiver. The immediate effect of the order was to enable the captains to give delivery to the appellants, which they would not have been in safety to do if they had continued to be parties to the cause.

It is perfectly true that by the consent order the appellants were not made judicial receivers, and that no obligation was thereby laid upon them to take delivery of the cargoes. But, notwithstanding the absence of an obligation to that effect, the terms of the order appear to me plainly to imply that it was in the contemplation of both parties alike that the appellants would receive and store the cargoes as they arrived, paying freight and landing charges. It was expedient and necessary, in the interest of the litigant who might in the end prove successful, that these acts should be performed by some one, and it has not been suggested, and cannot, in my opinion, be plausibly suggested that the respondents expected or intended that they should be performed by anybody other than the appellants. Accordingly the Order is framed and could only prove effective upon the assumption that the appellants were

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to obtain receipt of the cargoes, and in that contemplated event, it expressly provides that the appellants are to keep separate accounts of their expenditure and receipts, and are to abide by any order which the Court may make with respect to the cargoes or their proceeds. The provision as to keeping separate accounts obviously means that the appellants were not to mix up the items of expenditure and receipt relating to those eleven vessels with their general account as agents of the Peruvian Government, and must, therefore, have been inserted in the order with a view to the possible event of the respondents succeeding upon the merits of the action.

In these circumstances, I am unable to hold that in taking delivery of the cargoes the appellants acted as wrongdoers, or for the purpose of setting up a title adverse to the respondents. Although they were not judicially appointed to receive, the appellants appear to me to have acted as they did within the contemplation and intention of the respondents themselves, with the view of protecting the cargoes in the meanwhile, and of placing them under the control and orders of the Court for the purposes of the litigation. I agree with Bowen L.J., in thinking that the appellants acted as receivers de facto with the implied assent of the respondents; not as it is now contended in their own wrong, but rightfully, as rightfully as if it had been under the Order of the Court. I agree, moreover, with all the observations of the Lord Justice as to the implied right of the appellants to receive payment of their advances. They were, in my opinion, fairly entitled in the circumstances of the case to rely upon these advances being repaid to them in the event of their defence failing, and of their being called upon to deliver up or account for the cargoes of which they had obtained receipt. If it was the intention of the respondents to insist that notwithstanding the arrangements then made the appellants ought to be treated as wrongdoers, and ought not to have their necessary advances repaid to them, I think it was their bounden duty to say so. If they had said so explicitly on the 30th of April 1880, I hardly think the appellants would have consented to the Order of that date; it would manifestly have been more advantageous for them to consent at once to the appointment of an official receiver in terms of the respondent's motion.

I am, therefore, of opinion that the judgments of the Vice Chancellor, and of the Appeal Court upon this part of the case ought to be reversed, and that your Lordships ought to declare that the appellants are entitled to receive payment, out of the proceeds of the eleven cargoes of guano in question, of all sums disbursed by them on account of freight and landing charges which have not been already repaid to them or credited to them in account with the Peruvian Government. I think the finding of the Vice-Chancellor with respect to costs should be allowed to stand, and that the appellants ought to have their costs in the Appeal Court and in this House, and I move accordingly.

LORD FITZGERALD:—

My Lords, when the plaintiffs instituted the motion for an injunction and receiver they claimed that an officer of the Court should be put in actual possession to realise and receive the produce of the goods, and hold the net produce in usum juris. But it is unnecessary to point out that the net produce could only be reached by deducting freight and landing charges. Such was the position of the parties

when the plaintiffs instituted the motion which resulted in the order of the 30th of April. That order was in form only an order of the Court. It was essentially a compromise of the pending motion. It was a give and take order, under which each party took benefits; the larger proportion being with the plaintiffs. When I learned, in the course of the discussion, that the order had been in fact arranged by the counsel for the litigant parties, I confess that I was astonished that any question could be raised as to the right of the defendants to be recouped the moneys they had advanced to make the property available, and astounded at the success of the plaintiffs' contention.

Taking into consideration the circumstances I have adverted to, that order is in my judgment essentially and in all its ingredients a consent order, and as much as if every term of it had been preceded by the words "and by consent of both parties." There is no magic in the term "consent," you may substitute for it "arranged between and acquiesced in by both parties." The result is the same, and we ought not to suffer any departure from it. The plaintiffs obtained considerable benefit under it; the consent of the defendants to the whole order to strike out the captains as defendants and dismiss the action as against them without costs; the amendment of the summons, by extending the plaintiffs' claim to three other cargoes then afloat, and which had not arrived either at port of call or port of discharge; the undertaking of the defendants that the receipt by them of the cargoes should not prejudice any question between the parties, and that they would keep separate accounts of expenditure and receipt in respect of the cargoes. The defendants became in effect under that order quasi receivers, though not so called, with some if not all of the responsibilities of the office, but without emolument. If they took possession under that order it was in usum juris, subject to the orders of the Court; and the undertaking that they should keep separate accounts of receipt and expenditure affords a key to the true interpretation of the order. It was subsequent to that order that, with the exception of two payments in advance, the defendants paid the freight and landing charges, charges to the extent of many thousands of pounds. When the defendants under that order were permitted with the acquiescence of the plaintiffs to receive the cargoes, it seems to me necessarily to import that they were invited to do such acts as were necessary for the purpose, and, inter alia, to pay freight and charges.

My Lords, I have already expressed the interpretation I put on the agreement between the parties incorporated in the order of the 30th of April, I adopt the reasoning of Lord Justice Bowen, and the judgment of my noble and learned friend, and I rejoice at being able to concur in the order now proposed, which is in my judgment in accordance with law and right.

LORD MACNAGHTEN:—

My Lords, I agree with the Court of Appeal on the point upon which that Court was unanimous, but the claim of the appellants to be allowed the amount of freight and charges paid by them stands I think on a different ground.

The argument on this branch of the case was presented by the appellants' counsel in two ways. In the first place, your Lordships were invited to examine the general law applicable to the question, and then to consider the effect of the order of the 30th of April 1880. The learned counsel for the

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respondents followed the same line of argument. As your Lordships entertain no doubt as to the effect of the order, it is not necessary to express any final opinion upon the larger question. But as I am unable to concur in the view of the Court of Appeal on this point, I desire, out of respect for their judgment, to state some of the reasons, which lead me to doubt the soundness of their conclusion. The argument of the learned counsel for the respondents, which was adopted by the majority of the Court of Appeal, may be found stated, in so many words, in several cases at Common Law. In itself the argument is perfectly sound. The appellants, it is said, had no right to this property, it belonged to the respondents. They could not therefore obtain a lien by expending money in connection with it. How then can they claim to be allowed their expenditure? They cannot surely set up their own wrong.

But, although the Courts of Law not unfrequently put forward that argument, they seem to have been in the habit of escaping from its logical consequences by the convenient instrumentality of a jury, more concerned to administer what they thought justice than to maintain the strict rules and rigorous maxims of the Common Law. In cases of trover and in cases of trespass, where there were no circumstances of aggravation, juries were told that they might take into consideration, in mitigation of damages, payments which the plaintiff himself would have had to make if the defendant had not made them. For instance, in *Doe* v. *Hare*, 2 C. & M. 145, in an action for trespass for mesne profits tried before Lord Lyndhurst, when Lord Chief Baron, the defendant, who had been wrongfully in occupation of land, was allowed by way of deduction a payment for ground rent which he was obliged to make as occupier. On motion to increase the damages by the amount deducted, the Court refused to disturb the verdict, Baron Bayley saying, "The defendant only paid what the plaintiff must have paid, and if so the plaintiff is not hurt." *Doe* v. *Hare* was approved and followed in *Barber* v. *Brown*, 1 C. B. (N.S.) 121. So in *Clarke* v. *Nicholson*, 6 C. & P. 712, and 1 C. M. & R. 724, in an action of trover for goods belonging to the assignees of a bankrupt, wrongfully seized and wrongfully sold by the sheriff, the sheriff was allowed the expenses of sale, because the goods must have been sold by the assignees if not sold by the sheriff. On appeal in the Court of Exchequer, the Lord Chief Baron (Lord Abinger) said, "We do not lay it down as a matter of law in any case, but we say that the jury are entitled to make these deductions if they think them fair." Another case which seems to me to throw some light upon this question is the case of *Reid* v. *Fairbanks*, 13 C. B. 692. The case was this. An unfinished ship was wrongfully taken out of the possession of the plaintiffs and completed by the defendants. The plaintiffs sued in trover, and claimed in damages the value of the ship as increased by the defendants' expenditure. Mr. Justice Maule said, "it may be that the wrongdoer who acquires no property in the thing he converts acquires no lien for what he expends upon it, and the owner may bring detinue or trover, but it does not follow that if the owner brings trover he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion of their ship." Chief Justice Jervis added; "that is, what she was

really worth when the defendants converted her; the plaintiffs had lost the value of the vessel before the defendants began to lay out money upon her." And, when it was urged that there was no warrant for saying that the plaintiffs' right was limited to the value of the ship only after deducting what the defendants had wrongfully laid out in completing her, the Chief Justice answered, "In strictness that may be so, but no jury would give such damages, and they would always give what they conceive the plaintiffs justly entitled to."

Perhaps, however, the most instructive cases are those relating to coal trespass, from *Martin* v. *Porter*, which was decided in 1839, to a Scotch case recently before this House. They indicate the current of modern authority, and shew the way in which Courts of Equity dealt with the subject when they were empowered to award damages. The rule of the Court of Equity in cases of coal trespass has lately been adopted in your Lordships' House. The result is that, in these cases at any rate, every Court must now recognise and apply that measure of justice which Courts of Law formerly declined to admit as a matter of law, but left to juries to apply when the equity of the case required it.

Martin v. *Porter*, 5 M. & W. 351, was an action for trespass for working the plaintiff's coal. It was held there that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it, but allowing the cost of bringing the coal to bank. At the trial Baron Parke pointed out that if the action had been in trover, and the plaintiff had demanded the coal at the pit's mouth or on the canal bank, he would have been allowed the value of it at the place of demand, without making any allowance either for working or for bringing it there. However, the same learned Judge in *Wood* v. *Morewood*, 3 Q. B. 440, which was an action of trover for coal, tried at the Summer Assizes in 1841, directed the jury that if the defendant were not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coalfield had been purchased from the plaintiff. The jury in that case acted on the suggestion of the learned Judge; and so the claim, which would have been £10,000 or £11,000 according to the rule in *Martin* v. *Porter*, was reduced to £2310. There was no motion for a new trial in that case. But in the following year the rule in *Martin* v. *Porter* was twice re-affirmed, in *Wild* v. *Holt*, 9 M. & W. 672, and *Morgan* v. *Powell*, 3 Q. B. 278, Baron Parke being one of the Court in *Wild* v. *Holt*.

However, when the same question was raised in equity after Lord Cairns's Act, the view of Parke B. in *Wood* v. *Morewood* was preferred and adopted by Malins V.C. in *Hilton* v. *Woods*, Law Rep. 4 Eq. 432, and afterwards by Lord Hatherley, when Lord Chancellor, in the well-known case of *Jegon* v. *Vivian*, Law Rep. 6 Ch. 742, and it was finally approved in your Lordships' House in *Livingstone* v. *Rawyards Coal Company*, 5 App. Cas. 25. In that case, after pointing out that there was no element of wilful trespass or bad faith on the part of the defenders, and that the minerals were not of special value as support to the surface, Lord Cairns expressed himself as follows: "Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule, in this country or in Scotland, that you

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have a right to follow the article which is taken away, the coal which is severed from the inheritance, into whatever place it may be carried or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken." Those observations, which are in accordance with the principles laid down in *Reid* v. *Fairbanks*, seem to me to be of the greatest importance, because I do not understand that they are necessarily confined to the case of coal trespass, and it cannot be denied that the payment of freight in the present case was at least as exceptional a circumstance as the bringing to bank of the coal in the case which Lord Cairns was considering.

I took the liberty of asking Sir Horace Davey, during the argument, if he would contend that if the owner of coal wrongfully severed happened to find it at the pit's mouth, he could recover it in specie, without making any allowance for hewing or bringing it to bank. The learned counsel said he certainly should so contend. Indeed, it was necessary for him to do so in order to support the proposition for which he was arguing. At present I am not satisfied that the learned counsel is right. It certainly would be somewhat strange that the wrongdoer should be entitled to allowances if the wrongful act is completed by sale, but denied those allowances, however just they may be, when the wrongful act is not complete.

In order to account for the supposed distinction between the two cases, the learned counsel argued that it might be that these allowances would be made in an action of trespass or trover, but that they would necessarily be excluded in an action of detinue. I am not sure that this proposition is well founded.

The old writ under a verdict in an action of detinue authorized the sheriff to distrain the goods and chattels of the defendant if he did not return the goods, or pay a sum of money which was the assessed value of the goods. "This," Mellish L.J. says in *In re Scarth*, Law Rep. 10 Ch. 234, "gave the defendant a choice whether he would give up the goods or pay the money, and drove into equity all who wanted to recover the actual goods." But I need not point out that equity would not interfere unless the goods were of special value; nor would it, I apprehend, assist the claimant if he refused to do equity by making just allowances. The Common Law Procedure Act 1854 enabled courts of common law to make an order for the return of the goods, if they saw fit to do so. The effect of that provision, as pointed out by Maule, J., in *Chilton* v. *Carrington*, 15 C. B. 730, is not to take away the option in all cases, but it enables "the Court or Judge to make an order for delivery, where it would be unjust to allow the defendant to have the option, and where he can, and in the opinion of the Court or Judge ought to, restore the chattel in specie." I am not aware of any authority upon the point, but I should doubt whether it was incumbent upon the Court to order the defendant to return the goods in specie where the plaintiff refused to make a fair and just allowance, and so claimed the interposition of the Court, under the Common Law Procedure Act, for the purpose of obtaining an advantage not consistent with the justice of the case.

I do not think that the cases re-

lating to policies of insurance referred to in argument have any bearing upon the present question. They were, with one exception, I think, cases in which persons who had voluntarily expended money in keeping up policies which did not belong to them claimed actively a lien on the moneys secured by the policies.

Nor do I think that any assistance is to be derived from the two cases at Common Law referred to by Sir Horace Davey, *Nicholson* v. *Chapman*, 2 H. Bl. 254, and *Lempriere* v. *Pasley*, 2 T. R. 485.

Those were cases of trover, and the question was whether the plaintiff was bound before he brought his action to tender the amount of expenses claimed by the defendants. Of course he was not.

My Lords, I have dwelt at some length on this part of the case because it appears to me that this question ought to be left entirely open and unprejudiced by anything that has fallen from the Court of Appeal. If the question should ever arise, it will, in my opinion, require much consideration and a fuller argument than has been addressed to your Lordships. I do not think that it can be disposed of in a summary way by saying that the defendants have no lien, and, therefore, are not entitled to any allowance. It will have to be determined whether there is any rule, founded on principle or authority, which compels the Court to enforce, as against a defendant who has acted honestly though mistakenly, extreme legal rights at the instance of a plaintiff who seeks to avail himself of the assistance of the Court for the purpose of obtaining an unjust and unfair advantage.

I now come to the order of the 30th of April 1880, and I must say, speaking for myself, that if it had not been for the judgment of the majority of the Court of Appeal, I should have thought the appellants' case too clear for argument. Putting aside for a moment the case of the two vessels whose cargoes had been discharged, though apparently the parties were not aware of the fact, the position of things was this. The respondents come forward alleging, and alleging correctly as the result proved, that the cargoes are theirs by right, and that they are entitled to prevent the captains from delivering them to the appellants, and to prevent the appellants from receiving them. Accordingly by their writ, issued on the 27th of April, they asked for an injunction against the captains, and an injunction against the Guano Company. They apply at once for an injunction against the company, and for a receiver. The captains, of course, could not be served in time for the motion. The order of the 30th of April is then made by arrangement. Now the object of the respondents' application was, of course, to keep matters in statu quo until the question between the parties, the question to whom the cargo belonged, the only question which had arisen, could be determined in due course. To keep matters in statu quo, it was necessary to provide at once for the delivery of the cargoes. That was provided for by permitting the appellants, until further order, to receive and deal with the cargoes on certain undertakings. It was contended on behalf of the respondents that the order was not a consent order on their part. It was pointed out that the consent expressed in the order was the consent of the appellants, and of the appellants only. It may be so; but it only makes the case clearer against the respondents. If the appellants alone consented, what did they consent to? Not to a

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Afterwards, there was an inquiry before the Chief Clerk with respect to damages arising from detention of the cargoes, as ordered by the decree of the Vice-Chancellor. The Chief Clerk made his certificate in March 1889. He found that the detention of the eleven cargoes "commenced on the arrival of such cargoes respectively in Europe in 1880"; and, upon the footing that illegal detention continued until the Vice-Chancellor's decree, he allowed interest at 5 per cent. upon the proceeds of the cargo of each vessel, from the time of its arrival in port to the date of the decree, less the interest gained in Court and paid in by the receiver. It was admitted by the parties that, in consequence of eight cargoes having been sold by the receiver under orders of the Court, their proceeds were less by £2148 18*s.* 2*d.* than would have been obtained if the cargoes had been sold by Dreyfus

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proposition of their own; that would be absurd. Not to a suggestion by the Court: the Court did not interfere in the matter. It must have been to a proposal or suggestion made by the respondents. That proposal could only have been a proposal that the appellants should take delivery. The order proceeded on that footing; it is consistent with no other view. Having regard to the surrounding circumstances, it seems to me that the order is equivalent to an invitation by the respondents to the appellants to take delivery, and an authority to them to do so, so far as the authority of the respondents was required. On this footing, too, it seems to me that the action against the captains was dismissed. Coupled with their dismissal the order amounted to an authority to them to deliver the cargoes to the appellants, and it would have been a complete justification to them for doing so if their conduct in the matter had afterwards been questioned. Qui non prohibet quod prohibere potest assentire videtur is an old maxim of law. Here the case is far beyond mere non-prohibition. The respondents first prohibit, and then by arrangement withdraw the prohibition, and so sanction the act, which they were minded originally to prevent.

I agree with Bowen L.J. in thinking that the case of the two vessels whose cargoes had been delivered cannot be separated from the case of the other nine, and that all the cargoes must be dealt with in the same way.

It was urged by the counsel for the respondents that if this order is to be treated as altering legal rights on a matter not pointedly referred to in the order, it would tend to prevent arrangements being made between counsel. It might, I think, be retorted with equal justice that if the order is to operate as a trap and a pitfall, no counsel who did not feel perfectly sure of his ground, and a match for his opponent in astuteness, would ever venture to make any arrangement at all.

For these reasons I agree with the judgment of Bowen L.J., and I think the Order of the Court of Appeal must be reversed.

Brothers; and that, from the same cause, the expenses of sale were increased by £351 6*s.* 10*d.* These two sums, together amounting to £2500, with interest calculated in like manner to the date of the decree of 1885, were allowed by the Chief Clerk. The sums thus found to be due at the date of the decree, with interest at 4 per cent. to the date of his certificate, amounted to £34,111 18*s.* 11*d.*, at which sum he assessed the damages then due by the company.

The company took out a summons to vary the certificate, by striking out the finding that the detention commenced on the arrival of the cargoes in Europe, and finding in lieu thereof that no detention took place on the arrival of the cargoes in Europe, but that if any detention took place it occurred previously, viz., at Lobos, at or about the departure of the cargoes; and by striking out the finding that the plaintiffs had sustained damages to the amount of £34,111 18*s.* 9*d.*, and substituting a finding to the effect that they had sustained no damage.

The summons was heard before Mr. (now Lord) Justice Kay, who left undisturbed the Chief Clerk's findings as to damages (1). An appeal was brought, the result of which was that, on the 20th of January 1890 the Court of Appeal, consisting of Cotton, Bowen, and Fry, L.JJ., dismissed the appeal, Bowen L.J. differing upon the question of damages (2). Against this decision the company brought the present appeal.

1891. Nov. 27, 30; Dec. 1. Sir *R. E. Webster* A.G. (*Rigby* Q.C. and *Haldane* Q.C. with him) for the appellants:—

The decisions appealed against misconceive the real effect of the order of this House. The order of Bacon V.C. directed an inquiry "what damages have been sustained." That meant "what damages, if any." If it assumed that some damages were established or admitted, nominal damages or 40*s.* will satisfy the order. It cannot mean that damages are to be assumed in such a way as to entitle the plaintiffs to have them assessed on some principle which would be neither legal nor equitable. The inquiry would be satisfied by assessing nominal damages or at all events such damages as were caused by any acts of detention

(1) 42 Ch. D. 66. (2) 43 Ch. D. 316.

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committed before the issuing of the writ (27th of April 1880). There was some evidence that the defendants had detained two cargoes before that date. That was a sufficient reason for not appealing against that part of the order of Bacon V.C. and that explains why it was not touched by the order of this House. But the Chief Clerk's certificate has assessed damages for alleged acts of detention after the issue of the writ and after the consent order of the 30th of April 1880. This involves a misconstruction of that order. The consent order made the defendants quasi-officers of the Court and agents of the litigants to hold the proceeds for whoever might be entitled to them. The words "without prejudice to any question in the action" leave the question of detention just where it was. If the defendants had already committed any act of detention the plaintiffs would be entitled to damages, if not, not. The order cannot turn an innocent act into a wrongful one. The defendants were in the position of a receiver appointed by the Court. If a receiver makes a mistake or is guilty of negligence, the parties are not liable in damages. The bonâ fide assertion of a claim without more never has given a right in the other party to damages. Kay J. seemed to think that an action of detinue or trover would lie quia timet (1). There is no precedent for such an action; no such thing is known to the law as anticipated trover giving a right to the same damages as actual trover. The Court of Appeal did not hold the quia timet doctrine but decided that after the consent order of the 30th of April 1880, and even after the order for the appointment of a receiver, the detention continued. There is no authority for such a decision and it is inconsistent with the position assumed by the defendants with the plaintiffs' consent and for their convenience as much as for the convenience of the defendants. *Williams* v. *Peel River Land and Mineral Company* (2) relied on in the Court of Appeal does not support the contention; it turns on facts quite different from the present.

The decision of the Court of Appeal is inconsistent with the order made by this House. This House decided that the defendants were entitled to repayment of the freight and landing charges, and that decision must have been on the footing that

(1) 42 Ch. D. 66, 75.

(2) 55 L. T. (N.S.) 689.

the defendants were entitled to receive the cargoes, that they were not wrongdoers, and that they were therefore not liable for detention. The order of this House was inconsistent with and in effect reversed the finding of Bacon V.C. that everything done by the defendants after the consent order of the 30th of April was wrongful. The order for inquiry no doubt remains, but it must be worked out in accordance with the final order of this House, that is by assessing nominal damages. Substantial damages would be inconsistent with the order of this House, and with the consent order which invited the company to take possession of the cargoes and authorized them to do whatever was necessary or proper for consignees to do. For whatever period the interest is allowed it should be at 4, not 5 per cent.

Sir *Horace Davey* Q.C. and *Moulton* Q.C. (*Ingle Joyce* with them) for the respondents:—

The decree of Bacon V.C. ordering an inquiry what damages had been sustained "by occasion of the detention of the cargoes" is res judicata that there had been a detention, that there was an injuria entitling the plaintiffs to damages, and nothing in the order of this House affected that part of the decree. The duty of the Chief Clerk was to ascertain what the detention was and what was the quantum of damages. To find what the detention was the pleadings and the issues may be looked at. The statement of claim alleges a wrongful possession—an actual possession—at the port of call. The defence does not set up leave and license under the consent order of the 30th of April but asserts that the possession was not wrongful because the cargoes were not the property of the plaintiffs. Upon an inquiry into damages the question whether the inquiry was rightly directed cannot be gone into: and evidence of facts which would have been a defence to the action cannot be given in mitigation of damages: *De Gaillon* v. *L'Aigle* (1); *Speck* v. *Phillips* (2). Even if Bacon V.C. were wrong in directing the inquiry it is too late now to complain. The consent order of the 30th of April did not alter any of the parties' rights but expressly left them as they were. A man who has been deprived of his property does not lose his claim to

(1) 1 B. & P. 357, 368.
(2) 5 M. & W. 279.

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damages because he takes reasonable means to protect himself, e.g. by obtaining an injunction and consenting to an order without prejudice to any question: *Williams* v. *Peel River Land and Mineral Company* (1), where the Court of Appeal held that the detention of the stock by the bank under the consent order did not alter the plaintiffs' rights but constituted a continuance of the wrongful detention. The defendants have admitted an actual loss owing to the cargoes being sold by them instead of by the plaintiffs. The consent order did not direct the defendants to take possession or sell, but left them free to do so and to sell at what price they pleased. Nothing in the order placed the defendants in the position of receivers. The plaintiffs got no benefit from the order, except that the defendants agreed to abide by any order the Court might make; and that they were bound to do without the consent order. The benefit the defendants got was employing the plaintiff's property or its proceeds in their own business as rivals to the plaintiffs.

In such an action as this in Chancery the Court grants a mandatory injunction and gives relief in respect of matters which take place in the course of the action. The damages are given not for the threat to take possession but for carrying out the threat in the course of the action. Lord Cairns' Act (21 & 22 Vict. c. 27) by sect. 2 enables the Court of Chancery to award damages wherever it has jurisdiction to grant an injunction, and the damages may be for acts committed after the issue of the writ, and the Act extends to actions quia timet, e.g. a threatened injury to ancient lights. Lord Cairns' Act was repealed by 46 & 47 Vict. c. 49 s. 3, but subject to the qualification in sect. 5 which preserves the jurisdiction given by Lord Cairns' Act: *Sayers* v. *Collyer* (2). Where the evidence is conflicting so that the Court will not grant an interlocutory injunction counsel agree to an order. When an interlocutory injunction is granted the plaintiff always has to give an undertaking to pay damages in case the injunction is discharged. When a receivership order is granted the defendant is entitled to have a similar undertaking by the plaintiff in the event of the defendants being injured by the order.

(1) 55 L. T. (N.S.) 689, 692, 693. (2) 28 Ch. D. 103.

The order for the appointment of a receiver cannot affect the plaintiffs' right to damages, which is founded on their being kept out of possession. The defendants took possession long before that order was made and the loss to the plaintiffs continued till judgment was recovered. The plaintiffs' loss is the same whether the cargoes were in medio or in the defendants' hands. The plaintiffs ought to be put in the same position as if they had never been deprived of their goods by a bonâ fide but in fact wrongful claim. As to the rate of interest 5 per cent. is allowed because a merchant is supposed to make that in his business. As soon as goods are warehoused merchants can borrow money on the documents of title and employ it in their business. Five per cent. does not represent the real loss to the plaintiffs for being kept five years out of £200,000 worth of goods on which they had made advances.

Sir *R. E. Webster* A.G., in reply:—

The consent order of 30th April was a benefit as much to the plaintiffs as to the defendants. It was made because of difficulties in dealing with the cargo in the then state of things: the plaintiffs got the defendants hard and fast under the jurisdiction of the Court: and they were allowed to include in their action three cargoes which had been omitted from the writ. The Court would have had no jurisdiction to make such an order without the defendants' consent, and it is a breach of faith in the plaintiffs to claim the taking possession as a wrongful act. It was an essential condition of that order that the defendants should receive the cargoes. If they had been negligent in doing so, so that demurrage had occurred, they would have been liable to the plaintiffs in an action for negligence. There is no case where a suit having begun, and the Court having placed property in a receiver's hands, that has been held to be wrongful detention.

The House took time for consideration.

1892. Feb. 15. LORD WATSON:—

My Lords, in order to appreciate the points which are raised for decision in this appeal, it is necessary to refer to the course

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which this litigation has taken. [His Lordship then stated the facts given above.]

The question for decision in this appeal is attended with some difficulty. It depends upon the construction of that part of the Vice Chancellor's Order of 13th January 1885, which has now become final, directing an inquiry as to the damages sustained by Dreyfus Brothers. The Order contains no declaration that the company had detained the cargoes without legal title; but that inference is implied in the findings which it does contain, negativing the right of the company to reimbursement of the expenses incurred by them for freight and other charges, either under the Raphael Contract or otherwise. The terms of the order are equivalent to a finding that there had been wrongful detention of these cargoes by the company, and that Dreyfus Brothers were entitled to recover from the company the pecuniary loss, if any, which they had suffered by reason of such detention. But the order does not, either expressly or by implication, define the period of time during which that illegal detention existed. Its terms are consistent with the duration of illegal detention for such longer or shorter period as might be otherwise ascertained.

I can hardly doubt that, in directing an inquiry, the Vice Chancellor had satisfied himself that the illegal detention of the company had been so long continued that it might have occasioned substantial loss to Dreyfus Brothers. But I do not think that consideration is, of itself, sufficient to compel the Court to give damages for that which does not constitute illegal detention. At the same time, I hold it to be not only competent but necessary to refer to the pleadings of the parties and to the other Orders of Court for the purpose of ascertaining the precise issues raised in the action with respect to detention, and the extent to which these were dealt with by the Court either affirmatively or negatively. If on reference to these sources of information it were matter of reasonable inference that the learned judge had, however wrongly, in substance decided that certain acts constituted illegal detention, and had allowed an inquiry into the damage resulting from these acts, it would be too late now to correct his error.

The Chief Clerk, as I have already pointed out, supplied the

lacuna in the terms of the reference to him by assuming that the illegal detention of the company lasted from the arrival of the cargoes at their respective ports of discharge until the date of the Vice Chancellor's decree. If that had been expressly decided by the Vice Chancellor, or if it had been matter of fair inference from the pleas submitted by the parties, and the mode in which these were disposed of by his judicial orders, that the Vice-Chancellor had so ruled, the decision of this appeal would have been attended with very little difficulty.

In dealing with the arguments addressed to us upon this branch of the case, it will be convenient to divide the time during which, according to the view taken by the Chief Clerk, the illegal detention continued, into three periods. The first ends with the date of the consent order of 30th April, 1880; the second commences from that date and terminates either with the appointment of a judicial receiver or with the order for his appointment; and the third covers the period from such date until the decree of the 13th January 1885. The question whether there was illegal detention during each of those periods depends upon different considerations, which I shall deal with separately and in their order of time.

That the detention by the company was in its inception illegal, does not seem open to doubt. In their pleadings the plaintiffs aver, and the defendants admit, that the latter had assumed such possession of or control over all the cargoes in question, as would necessarily have defeated any extra-judicial demand made by Dreyfus Brothers for delivery of the guano to them at the several ports of discharge. Accordingly, the main issue raised by the pleadings was this, whether such possession as the company had admittedly taken and insisted on their right to retain was wrongful or not.

The company now maintain that their detention ceased to be illegal whenever their actings in relation to the eleven cargoes became subject to the consent order of April 1880; and in support of that contention they placed great reliance upon expressions used by members of this House when the present case was before it upon the question of disbursements for freight and landing charges. It does not appear to me that anything which

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was said by your Lordships on that occasion could affect, or did affect, the question whether the company at the time when they made these disbursements, were rightfully or wrongfully in possession of the cargoes. No such issue was raised in the appeal which the House had then to consider. The only issue before the House was whether certain outlays made by the company in relation to the cargoes in their possession—outlays which would have been equally necessary and expedient if the cargoes had been in the possession of a judicial receiver, or of Dreyfus Brothers—ought to be disallowed to the company as expenditure incurred by them in prosecution of a legal wrong. All of their Lordships held that the terms of the consent order were sufficient to deprive the action of the company in making these outlays of any wrongful aspect, and to imply their right to be repaid. My noble and learned friend Lord Macnaghten expressed an opinion (1) that, apart from the consent order, the action of the company was of such a complexion that they were entitled to repayment of their expenditure; and that opinion had my entire concurrence. I shall only add that our decision did not proceed upon the assumption that, by reason of the consent order, the detention by the company had ceased to be in any sense illegal.

It therefore becomes necessary to consider whether the consent order of February 1880 had the effect of converting the detention by the company, which before its date was admittedly illegal, into lawful detention. If that were the plain import of the order I should be prepared to hold that there is nothing to be found in the pleadings or elsewhere which could prevent its receiving effect in the present question.

That the company from and after the date of the order continued to detain the cargoes, in the same sense in which they had been detaining them before it was pronounced, is plain enough. I am unable to find anything in its terms which, by reasonable implication, suggests that their continuing to withhold possession from Dreyfus Brothers was to be regarded as other than a wrongful act, if they failed in substantiating their right. The order sanctions certain administrative acts in relation

(1) Ante, p. 173.

to the cargoes detained, acts of which the party ultimately successful would reap the benefit; but that sanction does not, in my opinion, imply that the detention of the cargoes, which could hardly be in the interest of Dreyfus Brothers, was also to be treated as legal. That inference appears to me to be excluded by the condition that the acts sanctioned were to be "without prejudice to any question between the parties." The meaning of that condition was that the company, on the one hand, were not to be at liberty to found upon the permitted acts, either as fortifying their title to the guano, or as justifying their detention of it; and that, on the other hand, Dreyfus Brothers were not to be precluded from founding upon these acts as in themselves wrongful, for the purpose of depriving the company of any claim for reimbursement, or for any other purpose.

In so far as they allow damages for detention during the third period, I have come to the conclusion that the judgments appealed from are wrong. The order of the 17th of December 1880 for the appointment of a receiver had the immediate effect of making the company bare custodiers for the Court; and the appointment of the 23rd of February 1881 transferred the actual possession of the cargoes or their proceeds from the company to an officer of Court. In my opinion, detention by the company, whether it had been legal or illegal, ceased at the first of these dates. That circumstance would not affect the quantum of damages due by the company, if it could be shewn that the law regards loss arising to the party ultimately successful from the possession of the Court as stakeholders, as loss directly and naturally resulting from the previous wrongful acts of his adversary. I know of no principle, and of no authority, for that proposition. It appears to me that from the time when the order of the 17th of December 1880 was made, the company and Dreyfus Brothers stood towards each other in the same position in which they would have been placed if the eleven cargoes had never come into the possession of the company, and had been thrown into Court by the captains of the carrying vessels. When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law; and any damages which the successful party may suffer

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from the continuance of litigation are due to the law's delay, and not to any legal wrong perpetrated by his unsuccessful competitor.

Your Lordships were referred to the case of *Williams* v. *Peel River Company* (1) as an authority qualifying the doctrine that damages are not due for injury merely arising from delay in litigation. The case, when rightly understood, has no bearing whatever upon that point. Certain bonds were alleged and were ultimately found to be illegally detained; and in the course of the action, the plaintiffs obtained an injunction to restrain the defendants from selling the bonds during its dependence. The plaintiffs, who eventually succeeded, claimed damages on the footing that they, if the bonds had not been illegally detained, would have realized at a time when their injunction was in force; and the Court of Appeal gave damages on that footing. But the decision was in assessment of damages for detention, the illegality of which was not in dispute, and went upon considerations of fact which it is unnecessary to examine. The defendants did not plead that their possession was not illegal; the only plea they set up was that the plaintiffs could not complain of their own inability to sell at a time when they held an injunction against sale.

For these reasons, I am of opinion that the orders complained of relating to the question of damages and its attendant costs ought to be varied, and the cause remitted, with the declaration that the eleven cargoes of guano in question were illegally detained by the Peruvian Guano Company until the order for the appointment of a receiver; that the damages thereby occasioned to Dreyfus Brothers ought to be ascertained by charging the company with interest at the rate of 5 per cent. upon the proceeds of each cargo from the date of its arrival at the port of discharge until the 17th of December 1880, with interest at 4 per cent. upon the principal sum so ascertained until payment; and that neither party ought to have the costs incurred by them in relation to the question of damages either before the Chief Clerk or in subsequent proceedings before the Courts below. There ought, in my opinion, to be no costs of the appeal.

(1) 55 L. T. (N.S.) 689.

LORD WATSON:—

My Lords, my noble and learned friend, Lord Bramwell, who unfortunately is unable to be present to-day, has desired me to express his concurrence in the view I have stated. I will do so now in his own terms.

LORD BRAMWELL:—

My Lords, I entirely agree with the opinion of my noble friend, Lord Watson. The only doubt I have is whether the defendants' wrongful possession of the cargoes did not cease on the 30th of April 1880, on the ground that that order assumed a duty in the company to Dreyfus. But taking that order and the order for the appointment of a receiver together, it is impossible to hold that, after that, there was a tortious possession, or any possession by the defendants.

LORD MACNAGHTEN:—

My Lords, at the risk of repeating what has been said already, I must recapitulate briefly the proceedings in the action and the circumstances which led to the litigation. There is no other way that I can see of dispelling the difficulties which have gathered round a case in itself neither complicated nor difficult.

On the 27th of April 1880 Dreyfus & Co. issued a writ against the Peruvian Guano Company and the masters of certain vessels which were expected to arrive immediately with cargoes of guano from Peru. The writ claimed an injunction to restrain delivery to the company, and also asked for damages.

The origin of the dispute was this: There was an agreement known as the Raphael Contract made in 1876, under which the Peruvian Government were consigning large quantities of guano to the Peruvian Guano Company as their agents for sale. By the terms of the agreement the company had the right to designate the deposits from which the guano was to be obtained. They undertook the duty of transporting the guano to Europe and selling it on account of the Government. They were to receive a lump sum of £4 15*s.* per ton to cover their remuneration and all the expenses of transport and sale, including, of

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course, freight and landing charges, and they were to make monthly advances to the Government until the whole quantity specified in the agreement had been exported. In 1879 there was war between Chili and Peru. The Chilians got the upper hand, and they seized the most valuable guano deposits belonging to Peru, and destroyed the landing stages. Under these circumstances the Peruvian Government directed the company to take guano from a place called Lobos, which was still in their possession. The company were not unwilling to take the guano, and they chartered eleven vessels to bring it to Europe. But they alleged that the guano deposits at Lobos were of inferior quality, and as they had not designated these deposits for the purposes of the Raphael Contract, they declined to treat the consignment as coming under the agreement, so far, at least, as concerned their obligations to the Government, and they refused to continue the monthly advances. The vessels, however, were permitted to go to Lobos, and they were loaded there, and bills of lading were signed making the guano deliverable to the company or their assigns. The Government then laid an embargo on the vessels, and required that the bills of lading should be indorsed to them. This was refused. The Government thereupon threatened force, and so managed to get possession of all the bills of lading except the master's copy in each case, and one of each set of bills in the case of four of the vessels. The vessels were then allowed to leave, or made their escape. The Government not being able to arrange matters with the company to their satisfaction, determined to make over the cargoes of the eleven vessels in part payment of an existing debt to Dreyfus & Co., who had had a previous contract for the export of guano from Peru. They sent the bills of lading, of which they had got possession, to their financial agent in Paris, with instructions to get them indorsed, or to indorse them to Dreyfus & Co. The agent in Paris indorsed them himself, and sent them to Dreyfus & Co. on the 20th of April 1880. There were thus two rival claimants in respect of these eleven cargoes—the Peruvian Guano Company, who had chartered the vessels, to whose order the bills of lading had been made out, and who claimed the cargoes as having been completely appropriated to

them under the Raphael Contract, and Dreyfus & Co., whose title had arisen in the manner I have described.

Having commenced proceedings, as I have said, on the 27th of April 1880, Dreyfus & Co. at once gave notice of motion for an injunction against the company, and for a receiver. The matter was pressing, as the vessels were supposed to be on the point of arriving—in fact, two had already arrived. It was necessary, therefore, at once to provide for the delivery of the cargoes in order to prevent claims for demurrage. Neither of the parties had an absolutely clear title. Dreyfus & Co. evidently did not feel very sure of their ground. At any rate, the company were in a more advantageous position for the moment. In these circumstances, before the motion came on an arrangement was made which was embodied in an order of the 30th of April 1880. The arrangement was that Dreyfus & Co. should stand aside and allow the company, if they chose, to take delivery in assertion of the rights which they claimed. In order to remove every obstacle out of their way, Dreyfus & Co. dismissed the action as against the masters. The claim, which originally applied to the cargoes of eight vessels only, was to be extended by amendment to all. The company were to keep separate accounts of expenditure and receipts in respect of the different cargoes, and it was expressly agreed, with anxious and perhaps unnecessary iteration, that the receipts of the cargoes and the order should be without prejudice to any question between the parties, and any question in the action. The question in the action was the title to these eleven cargoes, and there was a consequential claim to damages. It is hardly necessary to say that there was no question in the action or between the parties in any shape or form as to the payment of freight; everybody knew that whatever might be the result of the action the cargoes could not be had without payment of freight and landing charges.

My Lords, the arrangement embodied in the order of the 30th of April 1880 was an obvious and a sensible arrangement. It was calculated to meet the necessities of the case, and, as far as possible, to keep matters in statu quo until the real issue between the parties could be tried. I have no doubt that at the time it was regarded by both parties as a perfectly fair arrangement,

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and intended by both to be carried out fairly. I have no doubt that if it had been suggested to Dreyfus & Co. at the time that if they only kept quiet and lay in wait they might, in the event of their succeeding in the action, get their guano carried from South America to Europe, and landed there at the expense of their more simple-minded opponents, they would have resented the suggestion as an imputation on their character for fair and honourable dealing. Honest men, even when maintaining their own rights, do not, as a rule, construct pitfalls for their adversaries. I have also no doubt that if at the time it had been suggested to the company that in the event of their failing in the action they might shuffle out of their liability in regard to damages by ignoring the title which they were asserting so boldly, and sheltering themselves under the order of the 30th of April, they, too, would have resented the suggestion. They would have said, I should think, that they had given an undertaking which precluded them from raising any such point, and that they meant to carry out their undertaking in good faith. Unfortunately, in the course of a hostile litigation, both parties in turn have attempted to take advantage of the order of the 30th of April 1880 in a manner sufficiently ingenious, but not otherwise, I think, to be commended.

To resume the narrative, the eleven vessels arrived at their ports of discharge at various dates, beginning with the 22nd of April and ending with the 27th of July 1880. The company took delivery of the cargoes and paid freight and landing charges, as they were, of course, intended to do by the arrangement of the 30th of April. And so far Dreyfus & Co. made no sign.

On the 17th of December 1880, on the application of Dreyfus & Co., an order was made by the Master of the Rolls for the appointment of a receiver of the eleven cargoes. The order was made with costs against the company, but they were to be at liberty to propose themselves as receivers. It may, therefore, be inferred, if the point is of any importance, that the Master of the Rolls thought that the application was occasioned or justified by some error or omission on their part, but that the error or omission was not so grave as of itself to disqualify them from acting

in the matter in an official capacity. Shortly afterwards a Mr. Greene was appointed receiver.

The action then proceeded in a very leisurely fashion. It was not until March 1883 that the pleadings were closed. With regard to the case made by the company, it is only necessary to say that they admitted having taken possession of the cargoes in question, and they averred that possession was taken under the Raphael Contract and the bills of lading. It did not occur to them at that time to justify or excuse their action by relying upon or referring to the arrangement of the 30th of April 1880. It was much later in the day when that view presented itself.

The trial took place before Bacon V.C. Judgment was pronounced on the 13th of January 1885. The judgment declared that Dreyfus & Co. were entitled to receive the cargoes of guano in question in the action, and an inquiry was directed in the following terms: "An inquiry what damages have been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in this action?"

The order also declared that the company were not entitled to be reimbursed their expenses in respect of any of the said cargoes except the expenses of sale of two specified cargoes, under an order of the Court, which it is not necessary to refer to more particularly.

The company appealed from the judgment of the 13th of January 1885. In the course of the argument on the appeal they abandoned their case except so far as related to their claim for payment of the sum of £4 15*s.* per ton, or repayment of such sums as had been paid by them for freight and landing charges. In the result the judgment of the Vice-Chancellor was affirmed.

From this order the company appealed to your Lordships' House. This House held that the company were entitled to be reimbursed the sums properly paid by them in respect of freight and landing charges, and varied the judgment of the Vice-Chancellor accordingly.

The inquiry as to damages was then proceeded with. Kay J., before whom the question came, confirmed the certificate of the Chief Clerk on this head. The Chief Clerk had found that the

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detention of the eleven cargoes commenced on the arrival of such cargoes respectively in Europe, and he had found the damages for detention to be (A) £2148 13*s.* 2*d.* diminution of gross proceeds owing to sale by receiver instead of by the respondents, and £351 6*s.* 10*d.* increased expenses of sale under order of Court; (B) £26,757 12*s.* damages for loss of interest on those sums and on actual proceeds of the cargoes computed at 5 per cent. from the commencement of the detention until judgment, less interest gained in Court and interest paid by receiver; and (C) £4854 6*s.* 9*d.* damages for nonpayment of those sums at 4 per cent. from judgment to the date of the certificate.

From the order of Kay J. the company appealed to the Court of Appeal. The learned judges of the Court of Appeal seem to have felt much embarrassed by the order of this House, with which they conceived the inquiry as to damages to be inconsistent; but in the result Cotton and Fry L.JJ. affirmed the order of Kay J. while Bowen L.J. thought that the inquiry might be reconciled with the order of this House by awarding to Dreyfus & Co. nominal damages only.

In the argument before your Lordships the learned counsel for the company pursued the line of argument which perplexed and divided the Court of Appeal. They said, and said truly, that it had been held in this House on the question as to reimbursement of the sums paid for freight and landing charges, that in view of that question the possession taken under the order of the 30th of April 1880 was not wrongful; that in fact it was held that the order was an invitation to the company to take delivery. How then, it was asked could possession under that order be a wrongful detention giving rise to damages? My Lords, I must confess that I am unable to see the difficulties which appeared so formidable to the Court of Appeal. I think the arrangement embodied in the order of the 30th of April 1880 did amount to an invitation to the company to take delivery of the guano, and an authority to the company from Dreyfus & Co., if and so far as any authority from them might be required, to do whatever might be necessary and proper to be done in order to entitle the company as consignees to delivery of the cargoes in question. But the invitation was addressed to people who were insisting

both by word and deed that the cargoes which they were invited to receive on terms were their own to deal with as they pleased without leave or licence from anybody, and the acceptance of the invitation was guarded and qualified by an express condition in the form of an undertaking on the part of the company that no question in the action should be prejudiced by the order or by the receipt of the cargoes. The result therefore is simply this: The company remain in the position which they took up originally, and which they avowed in their pleadings; they cannot deny that they obtained possession of each and all of the cargoes in question; they cannot deny that possession was taken by them under the Raphael Contract and the bills of lading; and they cannot set up the qualified permission which was granted to them by the order of the 30th of April 1880 as an answer to the claim to damages for detention.

I do not think that the company can dispute the finding of the Chief Clerk, that the detention of the eleven cargoes for which the company are answerable in damages began on the arrival of such cargoes respectively in Europe. But it appears to me that the detention of these cargoes by the company came to an end when the order was made for the appointment of a receiver. From the date of that order possession was taken out of the hands of the company. Thenceforth the possession was the possession of the Court. I do not think that the possession of the Court can be regarded as detention by the company, nor do I think that any loss or diminution of profit which may be attributable to the circumstance that the property in question in the action was placed in the custody of the Court is the direct or natural result of the detention by the company.

It appears to me therefore that Dreyfus & Co. are only entitled to damages for detention by the company as from the respective dates when the cargoes arrived in Europe down to the 17th of December 1880; and as there are no materials before the House for a more accurate computation of damages, I am disposed to think that the measure adopted by the Chief Clerk ought not to be disturbed except that the damages should not be computed for any time after the 17th of December 1880. On the amount so arrived at I think interest ought to be allowed at the rate of

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4 per cent. per annum from the 17th of December 1880 down to the day of payment.

It is not necessary to say anything with regard to the supposed contradiction between the inquiry as to damages directed by Bacon V.C. and the order of this House as to the reimbursement of sums paid for freight and landing charges. In my opinion the inquiry is not in the slightest degree inconsistent with the order of the House. It appears to me that if the attention of the House had been called to the inquiry when the former appeal was under consideration, the order for the inquiry could not have been discharged or varied.

I have felt considerable difficulty as to the proper order to be made on this appeal with respect to costs. The company have succeeded in cutting down the claim of Dreyfus & Co., but in my opinion they were altogether wrong in trying to get rid of the inquiry as to damages, and they were also wrong in trying to shelter themselves under the order of the 27th of April 1880.

In the result, therefore, I am of opinion that the order under appeal ought to be varied in the manner proposed by my noble and learned friend, and I agree that there ought to be no costs of the appeal and no costs of the various orders consequent on the inquiry as to damages, except so far as costs have already been awarded to the company.

LORD FIELD:—

My Lords, it does not appear to me that any great difficulties present themselves in the consideration of this appeal. The Vice-Chancellor having correctly held that the respondents were entitled to receive and deal with the eleven cargoes in question as their own property, necessarily directed a consequential inquiry as to damages, and, apparently with the assent of all parties, directed the inquiry to be, what damages had been sustained by the respondents "by reason of the detention by the appellants."

His order assumed, what indeed the pleadings and evidence shewed to have been the case, that there had been a detention of all and a detention by the appellants, but it did not lay down any principle upon which the damages should be ascertained, or define the periods of detention over which they should range;

and both these requisites had to be supplied by the subordinate tribunal.

With regard to the first, the Chief Clerk in his certificate has taken a percentage upon the net proceeds realized by the sales as the unit of damages. No complaint has been made of the certificate upon this ground, and I do not see any more convenient measure. But great complaint is made of the period over which the interest is calculated, both as to its commencement and termination.

The effect of the adoption of this principle is to give the respondents compensation for the loss to them of the net proceeds of the cargoes for longer periods than would have been the case had the respondents not been prevented from receiving them in due course in their own business and as their own property. But it assumes that if the respondents had sold the cargoes the net proceeds would have been at the respondents' bankers on the dates of the arrival of each ship; and may be in this respect open to the appellants' complaint, for it is urged that the realization of the cargoes must have occupied some time after arrival.

But it does not appear to me that this was necessarily the case, for it may be that the cargoes could have been realized upon the market before arrival by cash or bills against shipping documents. I do not know how this is, but it appears from the judgment of Cotton L.J. that no point was raised upon this either at chambers or before Kay J., nor indeed was it much, if at all, pressed before your Lordships. It is not probable that any great, if any, injustice has been done in this respect, and I am certainly not prepared to advise your Lordships to send the case back to the Chief Clerk for further inquiry upon this point. That course might involve a long and expensive inquiry.

As to the period of termination adopted by the chief clerk, it was first said that the inquiry should be limited to the date of the order of the 30th of April, and confined to any prior wrongful acts that might be proved in reference to the vessels that had then arrived, nominal damages only being given in respect of the subsequent dealings by the defendants. It was argued that these dealings were not only not unlawful in themselves, but had been held not to be so by this House, and the

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judges below seem to have been very much impressed with this argument.

This contention is, however, based upon what appears to me to be a very erroneous view of the effect of the agreement carried out by the order of the 30th of April, and of your Lordships' order. The state of things was this—the appellants were in the *de facto* possession of the cargoes. The charters had been effected by them in their own names, and as each ship arrived they directed its movements and discharge as they thought best, and they claimed to do this as of right under the Raphael contract, and in order to realize their £4 15*s.* per ton. They were also practically in a position to do it from their influence with the masters, at all events in the majority of cases, whereas the respondents could only render their claim to possession effective by the intervention of a receiver, which would have been productive of cost and delay. It was to the interest of everybody that the receipt of the cargo and discharge of the ship—necessary acts to be done by somebody—should not be rendered difficult and expensive by the active intervention of the respondents with the masters of the ships, and the striking out of their names as parties to the action shews that one of the objects of the agreement was to remove this cloud, as it were, upon the title.

The respondents were therefore willing to stand aside as to the receipt and landing of the cargoes so long as the appellants dealt with them and conducted the sales fairly as between both sides. No doubt the calculated effect was that the appellants would, if they persisted in their claim, as they did, have to receive the cargoes and make the necessary disbursements. But that was all; and this is the construction which, as I understand the case, your Lordships put upon the agreement and order.

I have, of course, very carefully considered as well the Order of this House of the 18th of July 1887, as the reasons given by my noble friends who advised your Lordships on that occasion. In the result I am unable to find anything in any of them to shew that the receipts and dealings by the appellants were made lawful in the sense that the respondents' right of action in respect of them was affected. They were treated, as it appears to me, throughout as payments made within the contemplation

of the parties to the agreement of the 30th of April, although no doubt it was pointed out by my noble friend, Lord Macnaghten, that they might in any view well be considered as made under exceptional circumstances, so as to prevent the application of the alleged general rule as to the disallowance of a claim by a wrongdoer of compensation for acts done in the execution of his wrong.

I think, therefore, that the liability to damages continued at least up to the order for the appointment of the receiver, the 17th of December, but I agree with my noble friends, for the reasons which they have given, that it cannot be carried beyond. As to so much therefore of the item B, in the Chief Clerk's certificate, as extends to the subsequent period, and also as to the two other heads of damage, A and C, I am of opinion that the certificate ought to be varied. In no view, as it appears to me, can the items A and C be regarded as so consequential upon the wrong done as to entitle the respondents to claim them as damages. They are said to have resulted from the acts of the Court by its receiver, but I know of no authority for saying that that was a direct and natural consequence of the previous wrongful acts of the company.

At one time I entertained some doubt whether the respondents were not entitled, so far as the interest was concerned, to have it calculated down to the order for payment out of Court, but on consideration it appears to me that the language of the order of the Vice-Chancellor directing the inquiry cannot include the detention by the receiver. It may be that the appellants have in fact sustained damage by being deprived of their property up to the full date, and it might be argued that the company's refusal to part with their unlawful possession except upon terms of transferring it to the Court to hold for them as well as for the respondents, was in a sense the cause of the deprivation. But here also I think that it cannot be treated as so direct and natural a consequence as to justify an award of damages in respect of it.

I have come to the conclusion, therefore, that the appeal should be allowed to the extent I have indicated, and I think that the justice of the case will be met by dealing with the costs

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in the way proposed by my noble friend Lord Watson, in whose proposed order in other respects I concur.

Order of the Court of Appeal of the 20th of January 1890 *reversed in part and in part affirmed, with a declaration that the eleven cargoes of guano were illegally detained by the company from the respective dates of the arrival of such cargoes at their ports of discharge until the* 17*th day of December* 1880, *the date of the Order for the appointment of a Receiver, and that the damages occasioned to Dreyfus Brothers & Company by such detention ought to be ascertained by charging the Peruvian Guano Company, Limited, with interest at the rate of* £5 *per cent. per annum upon the net proceeds of each cargo from the date of its arrival at its port of discharge until the* 17*th day of December* 1880, *and with interest at the rate of* £4 *per cent. per annum upon the amount of such last-mentioned interest until payment thereof; with certain orders as to the costs: Cause remitted to the Chancery Division.*

Lords' Journals 15th Feb. 1892.

Solicitors for appellants: *C. & S. Harrison & Co.*
Solicitor for respondents: *G. M. Clements.*

[HOUSE OF LORDS.]

THE LONDON JOINT STOCK BANK . . APPELLANTS;

AND

CHARLES JAMES SIMMONS . . . . RESPONDENT.

H. L. (E.) 1892 April 4.

Bankers—Negotiable Securities—Deposit of Securities by Broker—Authority of Broker to Pledge—Pledge of Securities without Authority—Holder for Value and in Good Faith.

A person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who had none.

A broker in fraud of the owner pledged negotiable instruments together with other instruments belonging to other persons with a bank as a security en bloc for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded the bank realized the securities:—

Held, reversing the decision of the Court of Appeal ([1891] 1 Ch. 270), that there being as a matter of fact no circumstances to create suspicion the bank was entitled to retain and realize the securities, having taken negotiable instruments for value and in good faith.

The decision of this House in *Earl of Sheffield* v. *London and Joint Stock Bank* (13 App. Cas. 333) turned entirely upon the special facts of that case.

APPEAL from an order of the Court of Appeal (1).

The following statement of the facts is (except as to certain formal parts) taken from the judgment of Lord Herschell:—

In the month of October 1887, Herapath, Delmar & Co. had in their possession the bonds of $15,000 Cedulas belonging to the plaintiff. On the 12th of October Delmar on behalf of his firm entered into a contract with Messrs. Prior & Williams, jobbers on the Stock Exchange, to sell them $15,000 of Cedulas for the settling-day of the 14th of October. He at the same time contracted with Messrs. Prior & Williams to purchase of them like bonds of the same amount for the account of the 28th of October, the price of these latter bonds being the same for which the former were sold, with interest at the rate of 6 per cent. for fourteen days added. On the 14th of October, in pursuance of the contract of sale, Delmar's firm delivered to Prior & Williams,

(1) [1891] 1 Ch. 270.

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or their nominees, the bonds of the plaintiff. On the 28th of October, in pursuance of the simultaneous contract of purchase, Herapath, Delmar & Co. received from Greenwell & Co., a firm of brokers whose name appeared on the clearing-ticket given by Prior & Williams, Cedula bonds of the same description and to the same amount as those which had belonged to the plaintiff.

The defendants, the appellant banking company, had for many years been in the habit of making advances to the firm of Herapath, Delmar & Co. and their predecessors in business, receiving as security for such advances stocks, shares, and bonds. The securities deposited were frequently changed, such changes generally taking place at or about the time of the fortnightly settlements on the London Stock Exchange. On the 28th of October 1887 the said firm obtained from the bank a temporary advance of £6500, in addition to the then current loan; and in addition to the securities which the bank then held for the moneys already advanced, and which by the terms of their security they were entitled to hold for any additional advances, Herapath, Delmar & Co. deposited with the bank the Cedula bonds which they had obtained from Greenwell & Co. on that day. The bonds were obtained from Greenwell & Co. in exchange for a cheque on the appellants, and without the advance of the £6500 the firm would not have had at the appellants' bank sufficient funds to meet the cheque in favour of Greenwell & Co. and the other cheques drawn by the firm on that day.

Delmar afterwards absconded and his firm suspended payment. The bonds having been sold by the bank, the plaintiff on discovering what had been done brought an action against the bank alleging that Delmar had pledged the bonds without his authority and claiming (inter alia) a declaration as to the title and payment in respect of the bonds sold. The action was tried before Kekewich J. who made an order declaring that the bonds were the property of the plaintiff and were sold by the defendants without his authority, and ordering the defendants to pay to him £1703 8*s.* 3*d.*, the proceeds of the sale with interest. This order was affirmed by the Court of Appeal (Lindley, Bowen, and Fry L.JJ.) (1).

(1) [1891] 1 Ch. 270.

1891. Dec. 14, 15, 17. Sir *Horace Davey* Q.C. and *Finlay* Q.C. (*W. D. Rawlins* with them) for the appellants:—

The three questions dealt with in the Courts below were: First, were the bonds deposited with the bank the property of the plaintiff? Secondly were the bonds negotiable securities? Thirdly did the bank take the bonds in good faith and without notice that Delmar had no authority to pledge them? [Upon the first two questions the learned counsel discussed the evidence and contended that it had not been made out that Delmar had appropriated the bonds to the plaintiff; and that from the evidence and the admissions made at the trial it was too late to contend after the decision of this House in *Goodwin* v. *Robarts* (1) that the bonds were not negotiable securities.] Assuming however that the bonds were the property of the plaintiff, nevertheless being negotiable securities the bank is entitled to hold them as security for the amount advanced if the bank took them in good faith: that the bank gave value is admitted. The Court of Appeal seem to have thought that this House laid down in *Earl of Sheffield* v. *London Joint Stock Bank* (2) that bankers who dealt with any one who pledged securities had notice in every case of any defect in the authority. In fact since that decision whenever a case has arisen in the Equity Courts with facts somewhat similar that decision is cited as an authority that the case ought to be decided in the same way. A decision ought to be cited only for some proposition of law, and never as a decision upon facts or as a reason why a jury or a judge sitting as a jury should decide similar facts in a similar way. This is obvious, but it is disregarded every day. *Lord Sheffield's Case* (2) turned entirely on the special nature of Mozley's business: and the House held upon the evidence there given that the bank knew the nature of the business. That was a decision on a question of fact and is no more an authority for any other case than the verdict of one jury is an authority for another. The House laid down no novel doctrine of law: said nothing to alter the principle long established that where negotiable securities are pledged the question for the jury is whether the holder took them for value and in good faith. In *Foster* v. *Pearson* (3) the

(1) 1 App. Cas. 476. (2) 13 App. Cas. 333. (3) 1 C. M. & R. 849.

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principle was correctly stated except as to the necessity for "due care and caution"; that was set right in later cases, see *Raphael* v. *Bank of England* (1) where it was held that negligence did not invalidate the title of a holder who took for value and honestly. If a man has suspicions and the means of knowledge and wilfully shuts his eyes he does not act in good faith. Notice is of no importance except as an element in the question whether the holder takes in good faith. When it is said a holder is bound to inquire it must appear that the inquiry would have shewn that the holder could not honestly take the securities. Here there was absolutely no evidence of want of good faith on the part of the bank. If Delmar had been asked he would have answered truly that the bonds were his own.

Rigby Q.C. and *Warmington* Q.C. (*Grosvenor Woods* with them) for the respondent:—

[On the first two questions the learned counsel contended that the bonds were the property of the plaintiff, and that they had not been proved or admitted to be negotiable securities.]

Assuming that the bonds were the property of the plaintiff and that they were negotiable securities, the question is whether the bank took them honestly. The answer to that must depend on the course of business between the broker and the bank. To treat this transaction as an isolated case is entirely wrong. This was one of a series of dealings spread over several years between this bank and this firm of brokers. The bank understood exactly what was understood in *Lord Sheffield's Case* (2), that the broker sometimes dealt with securities not his own, and the bank chose to rely on the assumption that he had authority. The principle of *Lord Sheffield's Case* (2) is that when, from the course of business between themselves and the broker or money-lender, it matters not which, the bankers know that the securities offered by the broker include other people's securities they cannot set up a title to any one of those securities, for while they know an indefinite amount may belong to the broker, they also know that an indefinite amount must belong to others. When

(1) 17 C. B. 161. (2) 13 App. Cas. 333.

that is known the question is, What authority has the broker? Possessing that knowledge the bankers cannot in good faith treat the securities as if they were the broker's own. The bank here is the very bank in *Lord Sheffield's Case* (1): the circumstances were similar: some of the witnesses the same. The transaction in *Lord Sheffield's Case* (1) must have been present to the minds of the officers of the bank in this case. Certainly *Lord Sheffield's Case* (1) laid down no new law; but there are several passages in the judgments which mean, or seem to mean, that upon such facts only one right conclusion can be drawn in point of law. The validity of the transaction depends entirely on the authority of the broker. If the bankers know he is acting as agent they are put upon inquiry: *Cooke* v. *Eshelby* (2). The question whether securities are taken in good faith is, no doubt, a question of fact; but you cannot shut your eyes to the circumstances. On a single transaction a broker might perhaps have authority to pledge up to the value of the bonds; but it is highly improbable that a customer should authorize that as a regular course of business; still more that thousands of customers should authorize Delmar to borrow on their securities up to their full value and en bloc with other securities for a lump sum and for his own purposes. No question (it may be said) ever arose as to the propriety of any of the transactions; but they took care it never should, for in every case the bank released any particular security that was wanted. In *Lord Sheffield's Case* (1) the bank was taken to have known that as to some of the securities Mozley had no authority to pledge as he did. So here, the bank must be taken to have known that Delmar had no authority to pledge as he did. The bank must have known that Delmar had no authority to pledge A.'s property as security for B. If the actual thing done was not in fact authorized the bank can claim no title beyond the actual authority. The bank knew, or ought to have known, that Delmar had only a limited authority to deal with these bonds; the bank ought to have inquired into those limits and was bound by them. There can be no reason on grounds of public policy—such as there is in the case of documents of title affected by the Factors Acts—why banks who

(1) 13 App. Cas. 333. (2) 12 App. Cas. 271, 275.

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deal with brokers and other people of that class in negotiable securities belonging to others should be protected.

Finlay Q.C. in reply.

The House took time for consideration.

1892. April 4. LORD HALSBURY L.C.:—

My Lords, I believe this case, when it is examined carefully, raises no question of law, though doubtless some questions raised in other cases seem at first sight to be touched by it.

There is no doubt that the property which is the subject of debate (the character and quality of which I will discuss later) was at one time the property of the plaintiff. There is no doubt that the plaintiff, having left this property in the hands of a person named Delmar, one of the members of the firm of Herapath, Delmar & Co., merely for safe custody, gave no authority, express or implied, to Delmar to dispose of it, and there is no doubt that unless that property has been changed it is still the property of the plaintiff, and ought to be restored to him.

I prefer stating the proposition in this form because, though the disposal of one set of bonds, and the repurchase of others in their place, and their suggested appropriation as substitutes for those unlawfully disposed of, raises another question, it appears to me that the same question would arise in a much simpler form, but subject to precisely the same principles of law in the form which I have suggested.

Applying myself, therefore, to the simple form in which I have suggested that the question might be raised, the first point relied on is that the property in question is according to the law merchant negotiable, and if passed over, even by a person who had no title, but to one who received for value, in good faith, and without knowledge of the want of title in his predecessor in title, a good title is made by such transfer to an innocent holder for value. If the facts support this proposition it cannot be doubted. And first, as to the character and quality of the property itself. It consists of bonds known as Cedulas. It seems to me here it is impossible to dispute that the bonds in question were

negotiable instruments. I should have thought so upon the evidence, and after the decision of your Lordships' House in *Goodwin* v. *Robarts* (1). But I should equally think so here from the course pursued at the trial.

I take the statement of the facts from the judgment of Lord Justice Bowen, who said (2): "An admission was made at the trial to the effect that these bonds were commonly transferred from hand to hand by delivery, and this must be taken to be true. But the admission was carefully limited, and still left uncovered the question whether they are negotiable instruments in the sense in which bills of exchange and promissory notes are negotiable, so that delivery by a person who has no title confers, nevertheless, a title on a bonâ fide holder for value without notice. We should require either a more unqualified admission or else more conclusive evidence before we could accept the view that bonds like these had become part of the currency of this country, so as to have acquired the peculiar characteristics of a completely negotiable instrument. The appellants' counsel alleged that they had been misled at the trial by the form of the admission, and asked that, before we decided the case on the hypothesis that these bonds were not completely negotiable, an issue might be directed to try that question. For fear of a miscarriage of justice, we will, therefore, assume in the appellants' favour, and for the purpose of this case only, that the documents in question had been proved to be completely negotiable instruments."

It is to my mind clear, therefore, that your Lordships, if any doubt remained on the question whether these bonds were or were not negotiable in the true commercial sense of the term, could not decide this case without directing an issue such as the appellants' counsel demanded; in the event of your Lordships considering that the evidence and admission made at the trial, of what is after all in each case a question of fact, were insufficient, it would be impossible to decide adversely to the appellants. For my own part, I do not see how, after the evidence and the admission made at the trial, it is possible to suggest that that matter of fact is left in doubt.

(1) 1 App. Cas. 476.

(2) [1891] 1 Ch. at p. 294.

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The remaining part of the proposition is, as I have said, equally a question of fact: Did the bankers receive these bonds in good faith, and, though it was almost involved in the proposition, without any reason to suppose that the person from whom they received them had no right to so dispose of them?—and I am of opinion that they did. There is not, to my mind, the least reason to suppose that the bank did not take these bonds in the ordinary course of business, and with a full belief that the person from whom they received them was either the owner or had full authority to deal with them, as, in fact, he did deal with them.

The Court of Appeal appear to have been much influenced by the decision of your Lordships' House in the case of *Earl of Sheffield* v. *London Joint Stock Bank* (1).

The first observation that I would make is, that if, as I believe, it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another. The only question of law decided in *Lord Sheffield's Case* (1) was that a purchaser, even for value, cannot insist on his purchase if he knows that the person from whom he purchases has no right to sell,—no very novel principle of law, nor one upon which, I should think, much doubt could exist.

The second observation I make is that in this case the claim is to take from the bankers the securities they have received without paying what had been advanced upon them. In *Lord Sheffield's Case* (1) no one doubted that the bankers were entitled to receive the amount which had, in fact, been authorized by the owner of the securities to be raised upon them. But the cardinal distinction between the two cases is that in this case, upon the facts proved, I am of opinion that the bankers were under the full belief and conviction that the bonds were being lawfully dealt with, whereas in *Lord Sheffield's Case* (1), I thought (and I believe those of your Lordships who were parties to that judgment thought also) that the bank had actual knowledge that the person pledging them had only a limited authority to raise money upon them. And although it was also considered that the

(1) 13 App. Cas. 333.

bank sincerely believed that, as matter of law, that gave them a right to hold the securities for advances made beyond that limited amount, your Lordships held that the mistake of the bankers as to the matter of law did not cure the effect of their knowledge of the fact that the person to whom they advanced the money was exceeding the limit of his authority.

In expressing my opinion in *Lord Sheffield's Case* (1) I said (2): "But I do not believe Mozley's business could have lasted a month if the banks had not allowed this system to continue by exchanging securities. Mozley was, as he says himself, entitled to pledge them to the extent to which he had advanced money upon them, and the conclusion I draw from the facts proved is that the banks knew very well the system of money-lending pursued by Mozley, and trusted to him that he would not over-pledge, so to speak, the securities of his customers. Otherwise the very first security refused to Mozley's customer upon his tendering the amount advanced upon it would have brought the whole business to a very speedy end. My Lords, if this is the true view of the facts it is impossible to contend that the bank is entitled to the position of purchasers for value without notice. I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to inquire."

My noble friend Lord Watson said: "In my opinion the character of the transactions between the respondents and Mozley was, of itself, sufficient to notify to them that his interest was limited. The bank officials, when examined before the judge of first instance, substantially admitted that they knew that the bulk of the securities lodged by Mozley were those of his customers: and apart from the admission, it is matter of plain inference that they must have had that knowledge."

My noble friend Lord Macnaghten said: "The banks knew that the person who dealt with them as owner was not acting by right of ownership."

And my noble friend Lord Bramwell, though he was careful to disclaim an absolutely accurate definition of what was notice of the infirmity of the title, indicated that, in his opinion, at the

(1) 13 App. Cas. 333. (2) 13 App. Cas. 341.

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same time the banks lent their money they had "notice of the infirmity of the pledgor's title or of such facts and matters as made it reasonable that inquiry should be made into such title." He added that it was probably incomplete, but sufficient for the case he was then deciding.

My Lords, assuming all your Lordships who were parties to that decision to have been right in your view of the facts, and I certainly see no reason to doubt the conclusion at which I in common with your Lordships arrived, it is obvious to ask, what new principle of law is it possible to suggest was there laid down? It is manifest there was none.

Now when I turn from the facts proved in *Lord Sheffield's Case* (1) to the case now before your Lordships (although I must make a protest that it is not a very profitable inquiry to consider whether one case resembles another in its facts), I am of opinion that every one of the elements relied upon in that case to show the knowledge of the bank of the infirmity of the title is absent here.

I can find no trace of any such course of business brought home to the knowledge of the bankers as would give them the least suspicion that their clients had not full authority to deal as they were dealing with the securities in their hands. I observe the question was plainly put by Sir Horace Davey to one of the witnesses, who was asked whether there was a custom on the Stock Exchange for brokers to make one client's bonds or stocks security for another client's debt, and the answer was—No. It was then put that if the securities of ten clients were brought en bloc to the bank to borrow £10,000 the effect might be to make one client's property the security for money borrowed for another; the witness disclaimed any suspicion of any such transaction, and I confess I cannot share the view that Mr. Justice Kekewich took of the re-examination. Mr. Warmington asked, in substance, whether the banks did not suppose that they were dealing with honest men, obviously suggesting to my mind that it would be dishonest for Mr. A. to make Mr. B. security for Mr. A.'s loan.

Kekewich, J., seems to have been under the impression that relying on the broker's honesty did not alter the result. But to

(1) 13 App. Cas. 333.

my mind it makes the whole difference. If there is £10,000 borrowed, and ten different clients' securities, what is there to tell the bank, or to suggest to the bank, that the ten clients had not each either a joint interest in the £10,000, or a several interest, which their several property justifies the broker in pledging? I do not, of course, mean to suggest any such mental process on the part of the broker as that he should be supposed to be appropriating only such part of the deposited securities as would properly be pledgable to each individual customer; but what appears to me very clear is, that there is nothing in the nature of the transaction, nothing in the position of broker and customer respectively which makes it a reasonable inference that the broker was exceeding his authority, or, indeed, that there was anything which could be reasonably supposed to raise a doubt on the subject.

The inferences derived from the business carried on by the money-lender in *Lord Sheffield's Case* (1) were peculiar to that case, and have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. The deposit of securities as "cover" in a broker's business is as well-known a course of dealing as anything can possibly be, and the phrase that they are deposited en bloc seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know, that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client. It would, therefore, to my mind, be as totally different from the facts proved or inferred in *Lord Sheffield's Case* (1) as anything could well be.

I do not think that in that case any countenance was given to the notion that because Mozley, the money-lender, was assumed to be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt. To lay down as a broad proposition that

(1) 13 App. Cas. 333.

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in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Lord Sheffield's Case* (1) could justify so novel an idea.

The broad proposition laid down by Abbott C.J. (2), that whoever is the holder of a negotiable instrument "has power to give title to any person honestly acquiring it," seems to me to be decisive of this case.

The property in question, for reasons I have already given, was, or must be presumed to be negotiable. I think there was nothing in the evidence to raise a doubt that it was honestly acquired by the bank, and I am therefore of opinion that the judgment of the Court of Appeal should be reversed.

LORD WATSON :—

My Lords, I concur in the judgment which has been moved by the Lord Chancellor, and I shall endeavour to state shortly the considerations which induce me to differ from the decision of the Court of Appeal.

In the Courts below, as at your Lordships' bar, three questions were discussed :—Were the Cedula bonds for $15,000 deposited by Delmar with the appellant bank, on account of his firm, the property of the respondent? Were those bonds negotiable instruments? Lastly, if the bonds belonged to the respondent, and were negotiable, is the bank in a question with the respondent entitled to retain them?

I am prepared to answer the first of these questions in the affirmative. I am of opinion with Bowen L.J. and for the same reasons, that the bonds before they were taken to the bank on October 28, 1887, had been appropriated to the respondent in substitution for his original bonds of the same amount which Delmar had previously disposed of without authority.

The second question must also, in my opinion, be answered in the affirmative. Each bond, according to its tenor, appears to me to represent that the document will pass from hand to hand, and that any bonâ fide holder will be entitled to claim fulfilment of its terms from the Buenos Ayres Bank, by whom it was issued.

(1) 13 App. Cas. 333. (2) 3 B. & C. 47.

Then there is direct testimony to the effect that, on the London Stock Exchange, the bonds do pass from hand to hand by delivery only, and are treated as negotiable securities, and no attempt was made to shake that testimony either by cross-examination, or by adducing evidence to the contrary.

In my opinion it necessarily follows from the negotiable character of the documents, that Delmar, who was lawfully in possession of them for a special purpose, was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith and for value, although the transaction on his part involved a fraud upon the respondent. That is the rule of law which was laid down by Parke, B. (following the older authorities) in *Foster* v. *Pearson* (1); and it met with the approval of this House in *Goodwin* v. *Robarts* (2).

That the appellants gave value for the bonds is not disputed; and I have not found anything in the evidence or in the circumstances of this case to suggest that they acted otherwise than in good faith. They were dealing with a broker, at that time of unblemished repute; and, seeing that brokers, in the ordinary course of business, are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers, I think the appellants were entitled to assume, in the absence of aught to indicate the contrary, that whether the bonds belonged to Delmar, or to a customer, he had full authority to deal with them. The real question is, whether the appellants believed at the time that Delmar had such authority; and I see no reason to doubt that they honestly entertained that belief.

The Court of Appeal whose judgment was delivered by Bowen L.J. seem to have held that, in point of fact, the appellants believed that Delmar had authority to raise money on the Cedula bonds in question, within the limit of their market value, but not to deposit them en bloc, together with other securities, in order to raise a lump sum upon the whole. Even upon that assumption I should have given judgment for the appellants. They were, in my opinion, clearly entitled to retain the bonds for the amount which Delmar had apparent authority to borrow. I may observe that in the case where the true owner authorizes

(1) 1 C. M. & R. 849.
(2) 1 App. Cas. 476.

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a specific chattel to be impledged for its market value, he might suffer prejudice, and it would be an excess of the authority which he gave, to deposit it as part security for a larger sum. I doubt whether the same principle applies where the authority relates not to a specific chattel, but to negotiable securities which are the subject of traffic upon the Stock Exchange. In that case it appears to me to be immaterial to the true owner whether his securities are pledged by themselves for their full market value, or are deposited with other securities in order to cover an advance beyond that value.

The learned judges in the Courts below do not appear to have accepted the judgment of this House in *Earl of Sheffield* v. *London Joint Stock Bank* (1) in the same sense in which it has been regarded here. With reference to that case, I can only say that it certainly was not my intention to apply any other rule to its decision than that which was laid down in *Foster* v. *Pearson* (2). But I was satisfied, upon the evidence before us, that the banks concerned had such notice and knowledge of the limited title of their pledgor, as made it inconsistent with fair mercantile dealing that they should retain Lord Sheffield's securities for any sum beyond the extent of the pledgor's interest.

LORD HERSCHELL :—

My Lords, the litigation in this case has arisen out of the frauds of Mr. Delmar, a partner in the firm of Herapath, Delmar & Co., stockbrokers. The case of the plaintiff, the respondent in this appeal, is that Delmar having in his possession, for safe custody merely, certain securities of the plaintiff, known as Cedulas, fraudulently deposited them with the defendants by way of pledge for an advance, and that the defendants are consequently not entitled to detain them. The defendants deny that the securities pledged with them were the property of the plaintiff, and insist that even assuming this to have been the case, they have acquired a good title as against him.

The facts may be shortly stated. [His Lordship stated the facts given above, and proceeded :—]

(1) 13 App. Cas. 333. (2) 1 C. M. & R. 849.

I do not propose to enter upon the inquiry whether the plaintiff can establish a title to the bonds deposited with the bank, for in the view which I take of the case it is unnecessary to do so. I shall assume, for the purpose of my opinion, that these bonds were the property of the plaintiff.

The first question which arises, and to my mind a cardinal one, is, are these bonds negotiable instruments?

The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them. I shall have to advert hereafter to the conditions which are requisite in order to render the title of one who takes a negotiable instrument valid as against the true owner; but I dwell for the moment on the distinction to which I have called attention, because it is obvious that the facts to be proved by any one seeking to retain property he has obtained as against the person in fraud of whom it has been delivered to him, will differ essentially according as that property is or is not a negotiable instrument.

At the trial of the action evidence was given on behalf of the bank that Cedula bonds are commonly dealt with on the Stock Exchange. On the question being put, "Are they dealt with as negotiable securities?" the learned judge interfered with the observation, "There is no dispute about that," on which the learned counsel for the plaintiff said, "I do not want to make that admission." The question was then put, and answered in the affirmative. There was no cross-examination by the

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plaintiff's counsel directed to this point; nor was any testimony adduced to the contrary. Having regard to the evidence thus given, to the nature of the bonds, and to the decision of this House in the case of *Goodwin* v. *Robarts* (1), I can entertain no doubt that these Cedula bonds are negotiable instruments within the purview of that decision.

The question, then, which presents itself is, whether the appellants who are in possession of negotiable instruments which were delivered to them, I will assume, in fraud of the plaintiff, the true owner, can make good their title to them? That they became holders for value is not disputed; nor is it disputed that they took with full honesty of purpose. The allegation in the statement of claim is as follows:—"The bank knew, and had notice, not only from the general course of business hereinbefore referred to, but from the particular transactions between them and the plaintiff's brokers, that the securities deposited with them by the plaintiff's brokers were the securities of the customers of such brokers, and in the belief that the brokers who brought them had made sufficient advances on them to justify them in obtaining the amounts which they from time to time obtained from the bank, and relying on the integrity of the brokers, the defendant's bank from time to time made and continued advances to the brokers on such securities as the brokers from time to time deposited with them." Applying this allegation to the transaction under consideration, it would be impossible to conceive a more unequivocal admission that the appellants acted in complete good faith in taking the bonds in question. But the statement of claim goes on to allege that the bank "made no specific inquiries as to the ownership of the said securities, or the authority (if any) which the brokers had to deposit the same, or the interest (if any) which the brokers had therein by reason of advances on such securities, or otherwise." It is upon this allegation that the bank had notice that Delmar held these bonds in the capacity of an agent that reliance is placed. I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment

(1) 1 App. Cas. 476.

that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiry as to the title of the person with whom they dealt, and as to the authority which he possessed; and that having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that any one buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority. The Factors Act (6 Geo. 4, c. 94), which gives validity to sales and pledges by persons entrusted with the documents of title to goods, contained a proviso, "that the purchaser or pledgee had not notice by the documents, or otherwise, that the seller or pledgor was not the actual and bonâ fide owner of the goods sold or pledged—a proviso which, especially after the decision in *Fletcher* v. *Heath* (1), rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only" (per Blackburn J. in *Cole* v. *North-Western Bank* (2)). Accordingly the legislature intervened, and altered the law by the 5 & 6 Vict. c. 39. The recital is noteworthy, that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto." Under this Act a document of title to goods may safely be taken by way of pledge from one known to be an agent without any inquiry as to his authority. It would be strange, indeed, if a negotiable instrument might not as safely be taken. Advances on the security of negotiable instruments are as usual and ordinary a

(1) 7 B. & C. 517. (2) Law Rep. 10 C. P. at p. 367.

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course of business as advances on the security of goods and merchandise, and it is surely just as "expedient and necessary that reasonable and safe facilities should be afforded thereto." It was truly said that it was due to the Act of the legislature that documents of title to goods may safely be taken by way of pledge from an agent, and that there had been no such legislation in relation to negotiable instruments. But why not? The answer, to my mind, is plain—because it never was supposed to be necessary in order to give validity to such a transaction in the case of negotiable instruments. It is admitted that, in the case of a sale, legislation was not requisite; that the fact that the instruments were negotiable sufficed; why not, then, in the case of a pledge? If the contention of the respondent is to prevail, a negotiable instrument will be less negotiable than a bill of lading or a dock warrant—a strange conclusion, surely. The truth is, in my opinion, that what the Factors Acts have done is to attach some of the elements of negotiability to documents of title to goods, to render the mere possession of them evidence of authority to deal with them in the ordinary course of business, and to preclude the necessity of any further inquiry.

I proceed now to consider what the authorities show to be the conditions necessary to give a good title to a person taking a negotiable instrument from one who had, as against the true owners, no authority to transfer it. In *Foster* v. *Pearson* (1) Parke B. said: "The rule of law was long considered as being firmly established that the holder of bills of exchange indorsed in blank or other negotiable securities transferable by delivery could give a title which he himself did not possess to a bonâ fide holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been treated as essential to the validity of his title besides and independently of honesty of purpose." Now it will be observed that the learned judge considered two conditions only to be well established as essential to confer a good title upon the holder of a negotiable instrument, viz., that he should have taken it bonâ fide and for

(1) 1 C. M. & R. at p. 855.

value. The other condition which he mentions, that due care and caution should have been exercised by the taker of the securities, he refers to as a departure from "a rule of law long considered as being firmly established," and he deprecates its introduction. The law has now for some time been settled on this point in accordance with the view indicated by Parke B. In the *Bank of Bengal* v. *Fagan* (1) Lord Brougham said: "It may be taken as established that whatever may have been the law laid down in *Gill* v. *Cubitt* (2) and *Down* v. *Halling* (3), and one or two other cases, and not abandoned, at least as far as language went which the Court used in subsequent cases, is now law no longer, and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." This passage was quoted by Willes J. in delivering his judgment in *Raphael* v. *Bank of England* (4), where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable instrument in good faith and for value. I think, therefore, that the rule of law enunciated by Parke B. as firmly established is the existing law. No authority to the contrary was cited at the Bar, unless it be the recent case in this House of *Sheffield* v. *London Joint Stock Bank* (5). Now it is certain that none of the noble and learned Lords who took part in that judgment criticised or questioned, much less purported to overrule, any prior authority. I will state what I understand to be the grounds of the judgment. The person from whom the bank took the securities in that case was himself a pledgee of them; as such he had an undoubted right to repledge them. He, in fact, repledged them as security for a sum exceeding that for which he held them in pledge. They were with a number of other instruments, some negotiable and others not negotiable, made security for his entire indebtedness to the bank. The question which arose was whether the bank could insist on retaining them for the larger sum, or whether the owner could redeem them on paying to the bank the amount for which they were originally pledged. The noble and

(1) 7 Moore P. C. 72.
(2) 3 B. & C. 466.
(3) 4 B. & C. 330.
(4) 17 C. B. at p. 175.
(5) 13 App. Cas. 333.

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learned Lords came to the conclusion, as I understand, that the bank knew that Mozley held the securities in question as pledgee only in respect of an advance made upon them, or that if they did not actually know this, what they knew of the nature of his business as a money-lender, and the information which they derived from their transactions with him, made it almost certain that this was the case. That knowing or having every reason to believe that his title was only that of pledgee for a limited advance, they knew, or had reason to believe that in pledging them to the bank for his entire indebtedness he was exceeding any authority he had to deal with them. That under these circumstances it was incumbent upon them to make some further investigation if they wished to insist upon their security to the full extent. That the circumstances, as it was said, put them upon inquiry. I gather that their Lordships must further have been of opinion that if the bank had made reasonable inquiries they would have ascertained the facts and have thus had distinct knowledge of circumstances which would have made it appear that they could not hold the securities for anything beyond the advance in respect of which Mozley held them, and that in offering them as a security for a greater sum Mozley was exceeding any authority he had to deal with them. My reason for inferring that their Lordships entertained this opinion is that I apprehend that when it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it. Supposing Mozley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, I cannot but think that the decision of this House would have been different. There was in the case then before the House, however, no ground for supposing that if Mozley had been asked the question the facts would not have been elicited. When once the conclusion was reached that the bank must be taken to have known that Mozley was exceeding any rights which he possessed in relation

to the securities in purporting to pledge them for the sum he did, it followed that it would be contrary to good faith for the bank to retain them for anything beyond the sum for which he could legitimately pledge them, that as regards the excess the bank though holders for value were not holders of the securities in good faith. It will thus be seen that the judgment, which certainly did not purport to be a new departure or to lay down any principle of law differing from that already established, turned entirely upon the view taken of the facts. It would be unbecoming as it is unnecessary for me to express any opinion whether the findings were warranted by the facts proved. It is enough for me to say that the judgment leaves untouched what I believe to have been down to that time the established rule of law, that a person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. *Sheffield* v. *London Joint Stock Bank* (1) may perhaps be a binding authority as to the conclusions of fact arrived at, where the facts are identical, but not otherwise. In any other case the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

Applying myself now to the facts of the present case, I cannot find any warrant for such conclusions of fact as those which, as I think, led to the recent judgment of your Lordships' House on which so much reliance has been placed. The bank did not know, and had no reason to know, in what capacity Delmar became possessed of the bonds. They might be his own; he

(1) 13 App. Cas. 333.

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might be purchasing them for himself or a principal, and be seeking by an advance from the bank to obtain the means of paying the price, or they might be bonds on which he had himself made an advance. I cannot see that there was anything to suggest to the bank that he was committing a wrong or to make it reasonable and right that they should make further inquiry before entering upon the transaction. It was suggested, and this view seems to have found some favour with the Court below, that though the bank might have been justified in thinking that Delmar had the power to pledge the bonds for an advance to their full market value, they were not justified in supposing that he could be entitled to pledge them en bloc with other securities for a lump sum. If the course of dealing between the bank and Delmar was, as alleged, such that he was entitled at any time to obtain back any of the securities deposited on delivering others of an equal value, the distinction does not strike me as very important. But even if it could be material were the plaintiff seeking to redeem his bonds, and the question were for what sum the bank could claim to retain them, it does not seem to me to be material in the present case, where the plaintiff is not seeking to redeem the bonds, but insists that the bank have no title to them at all.

Further, assuming for the moment that the bank were put on inquiry and ought to have asked Delmar whether the bonds were his, and if not, by what title he claimed to deal with them in the manner proposed, can it be doubted what would have been the result of such an inquiry? Why your Lordships have listened to an elaborate argument, for which there was ample scope, designed to establish that the bonds were in fact Delmar's, and that if he had answered, as I think he undoubtedly would, that the bonds were his own, his answer would have been accurate. How can it possibly be contended that if the bank had made further inquiry they would have ascertained that Delmar was not entitled to make the pledge on which the bank take their stand?

My Lords, I have made these observations for the purpose of shewing the marked distinction which there is between the facts of the present case and those which had to be considered in

Lord Sheffield's Case (1). But I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

For the reasons I have given, I think the judgment appealed from ought to be reversed.

LORD MACNAGHTEN:—

My Lords, there are only three possible questions in this case: (1.) Did the Cedulas which were deposited with the London Joint Stock Bank on the 28th of October 1887 belong to the respondent at the time when they left the office of Herapath, Delmar & Co.? (2.) Were those Cedulas negotiable instruments? (3.) Did the bank take them in good faith? That the bank gave value for them was never disputed.

In the view which your Lordships take of the last two questions, the answer to the first, whatever it may be, cannot affect the result of the case. But as both Courts have considered

(1) 13 App. Cas. 333.

H. L. (E) 1892 LONDON JOINT STOCK BANK v. SIMMONS. Lord Macnaghten.

the question and answered it on consideration in the affirmative, I am unwilling to pass it by in silence lest I should seem to intimate a doubt for which in my opinion there is no room.

The firm of Herapath, Delmar & Co., consisting of a Mr. Herapath, who was admittedly innocent of any fraud, and a Mr. Delmar, who was undoubtedly a fraudulent person, held $15,000 Cedulas, Series J., on account of the respondent. They were held by the firm for safe custody only. On the 12th of October 1887 Delmar, without the knowledge of his partner, and in fraud of his customer, sold them. On the same day Delmar, on account of his firm, contracted to buy Cedulas of the same amount and of the same denomination to be delivered on the 28th inst. In due course Cedulas to answer this contract were delivered and paid for. To whom did these Cedulas belong when they came into the office of Herapath, Delmar & Co.? The object of the purchase, of course, was to repair and conceal the wrong which had been committed. Both the clerks who were concerned in the transaction, and who had no reason to suspect anything improper, say they knew at the time whose they were, and that they were the respondent's; neither of them was asked any question as to how he got his knowledge; nor is it material. There is no reason to distrust their recollection. And the only conclusion is that in some way or other, by word of mouth or by writing or by conduct, Delmar, who had dominion over these Cedulas, must have declared that they belonged to the respondent. Thus even without the aid of the entry in the number book, the value of which depends on a disputed fact—the date when the original entry was corrected or altered—there was, as it seems to me, a sufficient appropriation of the Cedulas in question to shew that they were the property of the respondent subject to his right to repudiate the transaction when he came to know the true facts.

Then were these Cedulas negotiable instruments? The Cedulas in question are foreign bonds with coupons attached, payable to bearer. Admittedly they pass from hand to hand on the Stock Exchange, and according to the evidence of the bank manager, who was not cross-examined on the point, they are dealt with as negotiable instruments. I do not see on what ground they are

to be denied the quality of complete negotiability. In a matter of this sort it is not, I think, desirable to set up refined distinctions which are not understood or are uniformly and persistently ignored in the daily practice of the Stock Exchange.

Lastly, did the bank take the Cedulas in good faith? They took them with other securities from a firm of stockbrokers who were at the time of unblemished reputation. They took them in the ordinary way of business to cover their current advances. In regard to this question the difficulty is to see what there was in the transaction to suggest a shadow of suspicion that there was anything wrong with the deposit. The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance, and it is said that the bank ought to have known it. But even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster* v. *Pearson* (1), such a practice—and the practice prevails in the case of stockbrokers as much as in the case of bill-brokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual.

My Lords, if it had not been for a mistaken interpretation of your Lordships' judgment in *Lord Sheffield's Case* (2) I doubt whether the present case would ever have been brought into Court. *Lord Sheffield's Case* (2) depended on its own peculiar circumstances. The settled law relating to negotiable securities was not in question. No one impugned it. No one cavilled at it. No one, as I understood the argument, thought of reviving qualifications long since exploded. But there it was held that the bank knew, or ought to have known, that the securities which the money-lender Mozley was depositing with them had been pledged to him by his several customers, that they were not his own, and that he could not pledge them for their full value. There was no want of good faith on the part of the bank in taking them in security to the extent of Mozley's pledgable interest. But there was, as it seems to me, a want of good faith

(1) 1 C. M. & R. 849. (2) 13 App. Cas. 333.

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in claiming to retain them for more than that limited interest, whatever it might turn out to be.

In commenting on *Lord Sheffield's Case* (1), Sir Horace Davey, referring to some remarks of mine in which the expression "representations" occurred, observed that the words used went too far. Of course there were no representations on the part of Mozley but what were contained in or to be inferred from the memorandum of charge. And certainly I did not mean to convey that if the bank had received from Mozley explanations which a reasonable man could possibly accept, the bank might not have held the securities for their whole value. But I think the criticism of the learned counsel was well founded, and I should have better expressed myself if I had been content with saying that whereas it had been suggested that the memorandum of charge neutralized the knowledge otherwise properly attributable to the bank, it seemed to me that that knowledge must prevail over any inference to be derived from the memorandum.

My Lords, I agree that the judgment appealed from ought to be reversed.

LORD FIELD:—

My Lords, I also am of opinion that this appeal must be allowed.

First, I am satisfied that the Cedulas in question are instruments in which property and possession are inseparable, and that delivery and possession, if taken in good faith, confer a valid title. They impliedly contain a promise to pay to bearer; they are issued and circulated in a foreign State; and, although the evidence as to the extent of their negotiability in this country was not (probably owing to a misapprehension) so full as it might have been, enough, I think, appears to bring the case within the authorities of *Gorgier* v. *Mieville and Another* (2) and *Goodwin* v. *Robarts* (3).

Secondly, it is not disputed that the bank are holders for value. It is not suggested that they were themselves guilty of any dishonesty or bad faith; on the contrary, Bowen L.J. expressly

(1) 13 App. Cas. 333. (2) 3 B. & C. 45.
(3) 1 App. Cas. 476.

finds that they were "honestly of opinion that Delmar could lawfully make the pledge in question." Their title, therefore, as holders in good faith cannot be defeated if it is shewn that they also held without notice—i.e. not necessarily actual notice or knowledge of any infirmity, but without the knowledge of circumstances calculated to excite in the mind of the bank manager suspicion, who, with the means of further knowledge at hand, wilfully abstained from availing himself of those means and making inquiry, from a suspicion that the result would be to inform him of some vice or infirmity of title by which the pledge the bank were about to take might be rendered insecure.

It was at one time, no doubt, thought that the title of a holder for value of a negotiable instrument would be destroyed if the omission to inquire arose not from any suspicion of a defect, but merely from a want of due care and caution on his part, but the authorities cited by my noble friend Lord Herschell have conclusively established that such is not the law.

In one of those cases, *Raphael* v. *Bank of England* (1), the plaintiff had at some earlier period received actual notice that the bank-note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover.

In another case, *Foster* v. *Pearson* (2) cited by my noble friend, some of the objections to the plaintiff's title were somewhat analogous to those in the present case. One of them was that the bills then in question were pledged to the plaintiff by the bill-broker for an antecedent debt of his own, but Parke, B., after stating that the rule that the holder of negotiable securities transferable by delivery can give a title, which he himself does not possess, to a bonâ fide holder for value, had been long considered firmly established, added that it was unnecessary to decide the validity of a usage for a bill broker to pledge for his own antecedent debt (which had been set up, but failed in proof), because, assuming the broker to have no such power as between him and his employer, or as to third persons who receive the bills with knowledge of *all* the facts, it by no means followed that

(1) 17 C. B. 161.

(2) 1 C. M. & R. 849.

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Messrs. Foster would not have a right to hold the bill. They might have supposed that the brokers were acting rightly in pledging their customers' bills, even if they knew them to be such, for their prior advance, because they might have given to those very customers a part of the £2500 which was the amount of that prior advance.

My Lords, it is, I think, worthy of observation that in the present case a portion of the £6500, which was advanced to Delmar, undoubtedly went to provide cash to meet a cheque drawn in payment for the substituted Cedulas. I do not suggest, of course, that the bank manager was aware of this, or that it could have formed any part of his calculations in taking the security, but it tends to shew, as regards any inquiry of Delmar, if the defect in the appellants' title rests upon the absence of inquiry of Delmar, which was the only means of further knowledge that presented itself to the manager, how little probability there is that the answer would have disclosed the absence of authority on his part to make the pledge.

Another objection taken to the appellants' title in this case, as putting the manager upon inquiry, also existed in the case of *Foster* v. *Pearson* (1). But it was overruled; for it was said that, although a bill broker must ordinarily be taken to be an agent to procure the loan of money on each customer's bill separately, without any right to mix bills together, and pledge the mass for one entire sum advanced to him personally, yet his employment is one which depends entirely upon the course of dealing, and there would be nothing unusual or unreasonable in such a course of dealing in the City of London for bill brokers to raise money for their employers by pledging the bills of different proprietors for one advance.

In answer to the objection, Parke, B., said that although, on the one hand, one proprietor may have to answer for the non-payment of another's bill, on the other hand, it may give facilities to the raising of money on negotiable paper, for it may well happen that a capitalist would advance money in this way who would not discount each particular bill. Indeed, in the case now before your Lordships, it was suggested, and may well be the

(1) 1 C. M. & M. 849.

case, that by that case the broker's customer obtains a loan on more favourable terms than if your broker could only pledge for each customer's individual debt.

My Lords, looking to the various exigencies of a stockbroker's legitimate business, as now carried on in the City of London, I fail to see any circumstances which ought in the present case to have caused the bank manager to suspect that Delmar was pledging securities which had been entrusted to him for safe keeping. The previous long connection with, and high character of, the firm of which he was a member, their extensive previous dealings, in which no irregularity is suggested as having taken place, tended to obviate the necessity for any inquiry, and I do not see any satisfactory ground for coming to the conclusion that the manager wilfully abstained from making it.

Indeed, the grounds upon which, as I understand, the judgments of the Courts below rest their decision, exclude any such wilful closing of the eyes of the manager. What I understand is said against him is that, as he took the Cedulas with knowledge that they might not belong in full dominion to the brokers, the manager wilfully abstained from inquiry into his title, from a misconception of law, in thinking that he had authority in law so to do without express authority given by the customer.

The learned judges below did not in any way question the principles upon which the authorities I have referred to rest, but they appear to have thought that the present case was covered by the recent decision of this House in *Lord Sheffield's Case* (1).

That case has undergone a very searching examination at your Lordships' Bar, and I have had the advantage of hearing the true view of it, as intended and understood by the Lord Chancellor and those of my noble and learned friends who advised your Lordships on that occasion, and I am quite satisfied, not only that no intention existed of questioning those principles, but that no such qualification is anywhere indicated. The decision seems to me to have proceeded rather upon the lines of *Cooke* v. *Eshelby* (2) and cases of that class, in which actual knowledge of the existence of an agency of a limited character only

(1) 13 App. Cas. 333. (2) 12 App. Cas. 271.

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is held to put the person dealing with the agent upon inquiry as to the extent of it.

It was indeed contended at your Lordships' Bar that mere knowledge that a proposed transferor might be dealing with a security as an agent was sufficient to put the transferee of a negotiable security upon inquiry, the mere absence of which, if a defect was, in fact, found to exist, would be fatal to his title. But I cannot accede to this contention. It is contrary to the authorities I have referred to, and it runs counter to the policy of the legislature, which seems to me to be to protect rather than endanger the rights of persons taking securities of a negotiable character honestly and in good faith.

It is for these reasons that I think that the appeal must be allowed.

Thirdly, there was an objection taken to the plaintiff's title, that he had not gained sufficient property in the substituted Cedulas to entitle him to maintain the action; upon that point it is unnecessary for me to express any opinion.

Order of the Court of Appeal and judgment of Kekewich J. reversed, with costs here and below; cause remitted to the Chancery Division.

Lords' Journals 4th April 1892.

Solicitors for appellants: *Clarke, Rawlins & Co.*
Solicitor for respondent: *R. S. Gregson.*

[HOUSE OF LORDS.]

JAMES CHARLESWORTH . . . . . APPELLANT;

AND

JAMES MILLS . . . . . RESPONDENT.

H. L. (E.) 1892 *April* 4.

Bill of Sale—Pledge of Goods with Possession—Licence to take Possession—Authority to sell Goods—Document containing Authority to Sell—Possession of Auctioneer—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43).

The owner of household goods which had been seized under a fi. fa. agreed verbally with an auctioneer that in consideration of his paying out the sheriff the auctioneer should hold possession of the goods, sell them by auction and pay over the balance (if any) to the owner. This agreement was reduced into writing and the sheriff was paid out, the man in possession remaining in possession for the auctioneer :—

Held, reversing the decision of the Court of Appeal (25 Q. B. D. 421), that since the written agreement did not constitute the auctioneer's title, and was not intended to and did not come into operation until possession had been actually transferred from the sheriff to the auctioneer, it was not an "assurance" or a "licence to take possession," or in any other respect a bill of sale within the Bills of Sale Acts 1878 and 1882.

Ex parte Hubbard (17 Q. B. D. 690) approved.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Day J.

In December 1887 the household furniture of Wilson was seized by the sheriff's officer under an execution at the suit of Townsend, and a man placed in possession. On the 9th of December Wilson asked the appellant Charlesworth, an auctioneer, to pay the sheriff out. Charlesworth after seeing the goods agreed to do this and the following arrangement was verbally made. The man in possession was to remain in possession for Charlesworth, who was to sell the goods by auction, repay himself the advance and hand over any balance to Wilson. This arrangement was carried out. Charlesworth paid out the sheriff, the sheriff's officer giving the following receipt :—

(1) 25 Q. B. D. 421.

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"9th December, 1887.

"*Townsend* v. *Wilson.*

"*Memo.*—That I have received from Mr. Charlesworth, auctioneer, cheque for £62 15s. 1*d.*, being the amount of levy and costs herein."

Wilson gave Charlesworth a letter as follows:—

"Hull, 9th December, 1887.

"Mr. Charlesworth, Auctioneer,
"Hull.

"Sir,—In consideration of your paying to Mr. C. F. Wells, the sheriff's officer, the amount of Townsend's writ and expenses, viz., £62 15*s.* 1*d.*, I hereby authorize and request you to hold possession of all my furniture and effects now on the premises No. 2, Pendrill Street, Hull, and to sell the whole by auction as soon as convenient, and after deducting the above amount and your charges, pay over the balance (if any) to me.

"Yours truly,
"A. P. Wilson."

The man in possession remained in possession for Charlesworth. On the next day, the 10th, Wilson gave a bill of sale of the same goods to the respondent Mills, who registered it. Wilson absconded and Charlesworth removed the goods to his auction rooms and sold them for about £55. Mills having brought an action against Charlesworth claiming damages for the detention and conversion of his goods, Day J. who tried the action without a jury held that the above letter was a bill of sale and not being in the form required by the Act was void, and gave judgment for the plaintiff for £112, the amount of his loss, and costs. The Court of Appeal (Lindley and Lopes L.JJ., Lord Esher M.R. dissenting) affirmed this judgment (1). From these decisions the defendant brought the present appeal.

1892. April 1, 4. *Witt* Q.C. and *Montague Lush* for the appellant:—

The letter which the Court of Appeal held was a bill of sale was nothing more than a mandate, an authority, from the owner

(1) 25 Q. B. D. 421.

of the goods, Wilson, to Charlesworth the auctioneer, to hold possession of the goods and to sell them and repay himself the advance out of them, and hand the balance to the owner. It was an ordinary auctioneer's transaction, with some of the elements of a pledge. No doubt until repayment Charlesworth was entitled to keep possession of the goods as a security. But that does not make the letter a bill of sale. The Court of Appeal seem to have been misled by the old fallacy that because the claimant "relies on" a document or "must look at it" to prove his claim the document is within the Bills of Sale Act. This document does not fall under any of the definitions of a bill of sale given in the Act of 1878: the only colourable one is a "licence to take possession," and that it was not, for possession was taken simultaneously with the advance and the creation of the document. The whole thing was one transaction, and no act remained to be done before possession was perfected. The sheriff's man at the moment he ceased to be in possession on behalf of the sheriff was in possession on behalf of Charlesworth. Wilson could not have maintained an action of detinue or conversion against Charlesworth for selling the goods the instant after the money was paid; therefore neither can Mills. It would perhaps have been better if no letter or document had been given, for then no one could have mistaken the transaction for a bill of sale. The Court of Appeal has itself pointed out the distinction in *Ex parte Hubbard* (1), where as here the possession was changed before or simultaneously with the calling into existence of the document. *Ex parte Parsons* (2) was a case of licence to take possession and has no bearing here.

Arnold Statham and *Dyer* for the respondent:—

The appellant looked to the letter as the basis on which he lent his money—as his security. There was no change of possession till after the sheriff had been paid out. The appellant would not advance the money till the document was signed, and then he paid not Wilson but the sheriff. Possession was therefore taken under and by virtue of the document. After the sheriff was paid out possession for a moment at least vested in Wilson,

(1) 17 Q. B. D. 690. (2) 16 Q. B. D. 532.

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and the document is therefore a bill of sale. "Hold possession" in the document means become the holder. More than what had been done was required to perfect possession, and it was clearly under the authority of the document that the goods were removed to the auction rooms. If a document constitutes the authority to take possession of goods as a security for a loan it is within the Act though possession be given at the same time. If the document contemplates the possibility of an interval between the intended immediate taking of possession and the taking it is a bill of sale. "Possession is an equivocal term: it may mean either actual manual possession or the mere right of possession": *Martin* v. *Reid* (1), per Erle C.J. When the terms of an agreement are reduced to writing you must look at the document only, as Lord Esher M.R. said in *Ex parte Parsons* (2), and where you must look at the document to prove your title it is a bill of sale. It was clearly a bill of sale within the Act of 1878 because the goods were in the apparent possession of the debtor. The letter was either a "licence to take possession of personal chattels as security for a debt"—see per Bowen L.J. in *Ex parte Hubbard* (3)—or "an assurance of personal chattels" within the Act of 1878. If this decision be reversed auctioneers will be in a very favourable position for lending money and defeating the Bills of Sale Act of 1882.

[They also referred to *Wordall* v. *Smith* (4); *Seal* v. *Claridge* (5); and *Newlove* v. *Shrewsbury* (6).]

The appellant's counsel were not heard in reply.

LORD HALSBURY L.C.:—

My Lords, I confess that but for the doubts which have been in the minds of the learned judges in the Court below, I should have thought that this was a very plain case. I am not quite certain that I appreciate at this moment what the learned judge who tried the cause meant by the phrases which he used. I can quite understand that what he called "the mischief" intended

(1) 13 C. B. (N.S.) at p. 735.
(2) 16 Q. B. D. 532.
(3) 17 Q. B. D. 690.
(4) 1 Camp. 333.
(5) 7 Q. B. D. 516.
(6) 21 Q. B. D. 41.

to be remedied by the Bills of Sale Act may have been very prominent before the learned judge's mind, but what it had to do with the facts of this case I am not able at present to fathom.

That the Bills of Sale Acts of 1854 and 1878 were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership however of which they had parted with, is manifest enough by the language of those statutes. The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which nevertheless the ownership was no longer theirs, those goods and chattels should be subject to the execution of bonâ fide creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons, and who were therefore entitled to have their debts satisfied when by the default of the assignees of those goods they had been allowed to continue in the possession of persons to whom the property in them no longer belonged. That was the intended policy; and for such purposes it is manifest that the Legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically changed, while the goods still remained in the apparent possession and dominion of the persons from whom the ownership had nevertheless really passed away.

My Lords, the Act of 1882 was directed to a totally different subject-matter. It was thought by the Legislature, rightly or wrongly, that a great number of impecunious debtors might be induced to sign documents the legal effect of which those persons did not understand. It was therefore intended by the Legislature, in order to protect them, to give a particular form of words which should plainly express the nature of the contract as to the loan and the security for the loan. The Legislature accordingly, in order to effect the object, gave a form of bill of sale, and made every bill of sale void unless it was in accordance with the form given by the statute. It seems to me that the Legislature neither intended to interfere, nor is it the effect of the legislation to which I have referred to interfere, with other

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transactions than those which the Legislature has expressly pointed out.

Now let us see what the transaction here is. First of all, is it within the mischief of either the Act of 1854 or the Act of 1878, the object and purpose of which I have described? The transaction here is a very plain one. The debtor has an execution in his house, the sheriff takes possession (upon what the effect and quality of that possession is, I will say a word presently), the debtor is under the impression that he can raise sufficient money upon the security of the goods of which the sheriff has taken possession to satisfy him, and also perhaps to leave a surplus for himself. For that purpose it is necessary that the execution should be paid out; the sheriff will not relinquish possession, and for his own security cannot relinquish possession until he has been paid the money. Accordingly the debtor goes to the appellant, Mr. Charlesworth, and invites him to lend him the money upon the security of the goods which at that moment are in the possession of the sheriff. Mr. Charlesworth agrees to do so, but he bargains and makes it a necessary part of the transaction without which he will not advance his money, that he shall get possession of the goods. That is agreed to. The effect and value of what is done I will discuss presently, as I have said, when I am dealing with what was in the possession of the sheriff. That was a bargain that the possession should be changed from the person to whom the money was being advanced to the person lending it. That, therefore, undoubtedly was not within the mischief intended to be cured by the Acts of 1854 and 1878. The transaction is completed, the money is advanced, and the sheriff is paid out.

Well, but it is said that this is a bill of sale within the Act of 1882—that the form of the instrument by which the property in these goods is changed and the assignment is made is within the Act of 1882, and that inasmuch as the Act of 1882, in furtherance of the objects which I have described, makes a bill of sale in such a form void even as against the grantor himself, no property passed by this instrument. The simple answer to that is that the whole foundation of that argument fails. There was no assignment, there was no bill of sale, there was nothing that

in the meaning of the Act of 1882 can be relied upon by reason of its operating a change of property, no such thing took place. The instrument itself does not purport to do any such thing. The reasoning of the Court of Appeal, so far as I can follow it at present, appears to be this, that although they affirm and rely upon their own decision in *Ex parte Hubbard* (1), they raise what to my mind would be a most serious and important question, having very wide consequences indeed—they raise a distinction between what is suggested as physical possession and formal possession.

Now, I must say that I received a very candid answer from the Bar when I put the question, what was the difference in the nature of the possession between the possession by the sheriff and the possession by the man who held the property on the part of Mr. Charlesworth? It was admitted with great candour that there was no difference at all in the character or quality of the possession. Then it comes to this, that the possession of the sheriff in this case—nay, I may say the possession of the sheriff in every case—must be regarded as open to that question, as to whether or not it is a physical possession or a formal possession. I am not quite certain that I am able to comprehend the exact distinction which has been pointed out. I understand what possession is (at least, I think so), and I never understood that the possession of the sheriff was other than physical and actual possession. I do not mean by that, that the sheriff's man has at every moment in his possession every article which exists in the house. It is obvious that such a possession, if it is to be limited to that, would be absolutely impossible; it would make the question of whether or not there was possession sufficient to vest the property in the sheriff a question depending upon the particular article or class of articles of which he was in possession; because some of them would be incapable of being grasped by the hand, if that is what is meant by taking physical possession. But what do I find occurred here? I find that there was a man in the house for the purpose of preventing any other person interfering with or removing or taking away any of the property in question; and it is not denied that if the assignor or any

(1) 17 Q. B. D. 690.

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one on his behalf had attempted to remove any of the articles which were in the house at the time when this man was in possession on behalf of Mr. Charlesworth, he would have been immediately stopped. Therefore, I should have thought that this possession was just as much a physical and actual possession as it is possible for any one man to have in articles which are distributed all over a house.

My Lords, under these circumstances, what is the problem which your Lordships are called upon to solve? We have the fact that the debtor has given a perfectly good mandate. I am not quite satisfied that the word "pledge" is properly applicable to it, although I do not deny that in some respects the rights of a pledgor may come in question; but the transaction is this: the man says, "I hand over these goods to you," in the only sense in which goods that are distributed over a house are capable of being handed over, "in consideration of your paying money to the sheriff and getting them out of the hands of the sheriff"; and then he draws up a document in which he says, "Now keep this possession for me, and sell the goods for what they will fetch by auction"; and of course after he has done that the person to whom they are handed holds them with this kind of trust attached to them, and when they are realized, if there is anything remaining beyond the amount of £62 which he has advanced upon them, he holds that money to the order of the person who has given him the mandate.

My Lords, that is the transaction; what that has to do either with the mischief contemplated by the Bills of Sale Acts, or what it has to do with a bill of sale at all, I confess myself totally unable to understand. It is a transaction in which, simultaneously with the handing over the goods and advancing the money (and I affirm that the words "handing over the goods" are perfectly applicable to such a transaction as this, because they are handed over in the only way in which goods distributed all over a house can be handed over), a document is signed by the borrower which says, "Pay yourself the money which you have advanced, and hand me the surplus if there is any."

It seems to me that the whole argument based upon the assumption that this is a bill of sale transaction at all entirely

fails. It therefore appears to me to be obvious that the judgment of the Court of Appeal must be reversed.

My Lords, there is one further observation which I wish to make, because it appears to me that there has been a confusion both in the argument, and (I say it with all respect) I think in one of the judgments, between what it is necessary to establish in a Court of Law when you are proving a transaction and the operative part of the transaction itself. I can well understand that where upon a trial, after the statement of the loan had taken place and after what the transaction was had been deposed to, one of the witnesses might have said: "There was a writing drawn up and it had relation to the transaction," then the judge would of course insist upon the production of the instrument in order to see whether or not the rights of the parties had been reduced to writing, and would not allow a mere parole description of the transaction to go on without the writing being produced. But after all that only comes to producing the writing such as it is; and if the writing when it is produced does not affect the rights of the parties, or make them different from what they would have been before, or from what they would have been if no writing had been referred to, no particular magic is applicable to such a thing as that.

One very cogent observation which appears to me to have been made by the Master of the Rolls on this subject, commenting on his own judgment and that of the rest of the Court of Appeal in *Ex parte Hubbard* (1), was this, that in *Ex parte Hubbard* (1) the whole transaction was disclosed upon the writing, including the making of the advance and the terms upon which that advance was made; and but for one circumstance, it might very fairly and reasonably have been argued to have been a bill of sale within the Act; but the distinction was this, that, although that document did profess to disclose the whole terms of the transaction, it was held, and I think rightly held (and I should have thought that the Court of Appeal were in this case bound by their own decision in *Ex parte Hubbard* (1)), that the Bills of Sale Act did not apply at all, that the transaction was one in which the possession had been already taken, and the relation

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of the parties such that there was no room for the application of any of the definitions in the Bills of Sale Act.

My Lords, under these circumstances, I have to move your Lordships that the judgment of the Court of Appeal be reversed.

LORD WATSON:—

My Lords, I can have no hesitation in concurring in the judgment which has been proposed, because I am quite unable to distinguish the present case in principle from that of *Ex parte Hubbard* (1). The document of the 9th of December 1887, which has been treated as a bill of sale by the majority of the Appeal Court, does not give any licence to take possession of the goods, and it did not constitute the title upon which possession was given to the appellant. It contains a mandate to hold and sell the goods; but it was not intended to operate, and did not, in point of fact, come into operation, until possession had been actually transferred from the sheriff to the appellant. In any question with the present respondent the case seems to me to be the same as if the goods had been sent for sale to the appellant's premises and an advance made against them by the appellant before the document in question was either written or delivered.

LORD HERSCHELL:—

My Lords, I am of the same opinion. The question in this case must be decided in precisely the same way as if the debtor, whose transactions have given rise to the controversy, had been himself bringing this action; and it certainly would be startling, to my mind shocking, if there were anything in the state of the law which compelled us to say that under the circumstances which occurred in this case he could successfully maintain such an action.

Now, I think that in a case of this description it is most important to bear in mind the distinction between the Acts of 1854 and 1878 relating to bills of sale and the Act of 1882. The only Act which can have any operation in this case to make the transaction void is the Act of 1882; and the earlier Act of 1878

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is only important as containing the definition of a bill of sale which is imported into the Act of 1882. But any reference to the Act of 1878 beyond that which is necessary for the purpose of transferring, so to speak, the definition contained in that Act to the Act of 1882 can only lead to misunderstanding and mischief.

Now, my Lords, the Act of 1882 no doubt makes a bill of sale void which is not in accordance with the prescribed form; but in order to make the Act operate at all it is essential in the first place to prove that the transaction was one which was effected by a bill of sale, of course using those words in the sense which is attributed to them by the Act of 1878. Well, was it so effected? It is true that a document was drawn up simultaneously with the acts which were done for the purpose of completing the right of Charlesworth in relation to these goods; but it is absolutely clear that it is not every document which may be drawn up at the time when a transaction is being carried out for the purpose of transferring goods from one party to another that is a bill of sale. In each case one must look at the circumstances in order to see what the transaction was, and what the document was.

Now, this document, beyond all question, was not a document which was intended to transfer, or did transfer, the property in these goods; because if there is anything clear in the transaction, it is this, that at the time at which this document, whatever its effect, began to operate, Charlesworth was in possession of the goods under an arrangement by which he was to have, for certain purposes at least, a title to them. He did not get his title under that document—he got his title by virtue of the transaction, and the document never began to operate at a time at which he had not possession. Under those circumstances, what words in the Act of 1878 are supposed to cover it? For the reasons which I have given it cannot be an "assurance." It certainly is not "a bill of sale" in the ordinary sense of those words. Is it a "licence to take possession"? The statement which I have just made seems to me to be conclusive that it is not a licence to take possession, because those words can only apply, as was pointed out by all the judges in *Ex parte Hubbard* (1)

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when the possession is to be taken subsequently to the signature of the document.

The case of *Ex parte Hubbard* (1) seems to me to be absolutely undistinguishable from the present case. In that case there was a document drawn up, containing the terms upon which the advance was to be made, the sale of the goods was to be effected, and the repayment was to be required. That was much more like a bill of sale than anything which is to be found in the present case, and yet it was held that because the transaction was one of pledge where the possession was given and taken independently of that document, although you might be obliged to have recourse to that document if there was a controversy about the terms of the advance, nevertheless you did not need to have recourse to the document for the purpose of establishing title. Now, what is the distinction between that case and the present? None that I have heard, unless it be that in this case Charlesworth was not put in possession of the goods simultaneously with the signature of this document. If Charlesworth was not put in possession of these goods simultaneously with the signature of the document, it seems to me that the sheriff was never in possession. I am quite unable to accede to the argument that a possession which is sufficient possession to make good the title of the sheriff under his authority to seize, is not a possession as between the person giving it and the person taking it, which is the only point we have to decide in the present case. The question whether it is a possession which excludes the apparent possession of the other party might arise under the Act of 1878; but it is not of the slightest importance in the present case. Is it a possession as between the person giving it and the person taking it? When once it is admitted, as it was inevitably admitted by the learned counsel for the respondent, that it was a possession sufficient as between those two persons to constitute a good pledge, it seems to me that the case is at an end. I say "inevitably admitted," because how can it be disputed that as between the two persons to the transaction it would have been impossible for the person who had received an advance on giving this possession to say that he had not given the other person a possession of the goods which would entitle

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him to hold them as a security for the advance? And that is all that a pledge is.

Then, if that be so, it seems to me to shew conclusively that the case is within *Ex parte Hubbard* (1), because what was there decided was that if the transaction be only one of pledge arising from a delivery by one party to the other of the possession of his goods as a security for the money advanced, it is immaterial that the terms upon which those goods are pledged are reduced to writing. It does not make it a bill of sale. The decision in *Ex parte Hubbard* (1) seems to me to be absolutely conclusive of this case.

But even if this were not a pledge, there is another possible view of it—namely, that the goods were delivered to Charlesworth in his capacity of auctioneer, to be held by him as auctioneer, with authority to sell them, and to retain out of the money which arose from that sale the advance which he had made. If that is really the true nature of the transaction—possibly even that might be a pledge with an authority to sell—but supposing it is not, strictly speaking, a pledge, and that what I have stated is a more accurate description of the transaction, the same result would follow—it would be an authority to sell which would be irrevocable, except upon the terms of paying back the money; and it seems to me impossible to say, that because the document which was given in this case was given simultaneously with the entering into that transaction, it was a bill of sale in any sense in which those words are used within the definition clause of the Act of 1878.

For these reasons, it seems to me that the case of *Ex parte Hubbard* (1) really governs this case. I desire to say that, so far as I am concerned, instead of seeing any reason to doubt the correctness of the decision in *Ex parte Hubbard* (1), I am very glad that that decision was arrived at; it has my hearty concurrence; and between that case and the present I can see no distinction.

LORD MORRIS:—

My Lords, I concur.

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LORD FIELD:—

My Lords, I am of the same opinion.

Order of the Court of Appeal and judgment of Day J. reversed, and judgment entered for the defendant below with costs here and below; cause remitted to the Queen's Bench Division.

Lords' Journals 4th April 1892.

Solicitors for appellant: *Pritchard & Sons, for Locking & Holdich, Hull.*

Solicitors for respondent: *John Cotton & Son, for John H. Green, Hull.*

[HOUSE OF LORDS.]

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HERBERT TAYLOR AND RICHARD NUGENT . . . . . } APPELLANTS;

AND

ARTHUR HENRY RUSSELL AND DONALD SWEEN MACKAY . . . . . } RESPONDENTS.

Mortgage—Priorities—Equitable Mortgagees—Fraud of Mortgagor—Title Deeds—Legal Estate—Negligence.

Land was devised to the S. trustees in strict settlement, the trustees, who were devisees to uses, having powers of sale and mortgage and as incidental thereto power to revoke the uses declared by the will. The trustees made a legal mortgage of the land with other property and afterwards sold the land to T. without notice of the mortgage (which appeared to have been forgotten) and handed the title deeds to him. T. shewing a forged title mortgaged the land to the plaintiffs (who believed they thereby acquired a good legal mortgage) and handed the forged title deeds to them. T. then made another mortgage shewing the true title to the defendant (who also thought he had a legal mortgage) and handed the genuine title deeds to him. Neither the plaintiffs nor the defendant had at the date of their respective mortgages any notice of the prior legal mortgage, and the defendant had no notice of the plaintiffs' mortgage. Afterwards the defendant discovered the existence of the plaintiffs' mortgage and of the prior legal mortgage, and thereupon induced the legal mortgagees to release the land from their mortgage (the remaining property being sufficient for their security) and to reconvey the legal estate by a

voluntary deed to the S. trustees on the express condition that the latter should immediately thereafter convey the legal estate to the defendant. This the S. trustees accordingly did, having at the time notice of the plaintiffs' mortgage. The plaintiffs having brought an action as first equitable mortgagees to establish their priority over the second equitable mortgagee:—

Held, affirming the decision of the Court of Appeal ([1891] 1 Ch. 8), that there was nothing to shew that the second equitable mortgagee had acted inequitably in getting in the legal estate; that there was no equity which prevented him from availing himself of its protection; and that he was entitled to priority over the first equitable mortgagee.

Observations by Lord Macnaghten upon the question of negligence and the judgment of Kay J.

APPEAL from an order of the Court of Appeal (1).

The facts are related in the report of the decision below and in the judgments of Lords Herschell and Macnaghten in this House. The following is an outline in the order of time:—

The property in question was a plot of land at old Shildon in the county of Durham, the fee simple of which belonged to Robert Surtees who died in 1857. Surtees devised his real estates in strict settlement. The trustees of his will, who were devisees to uses, had under the will powers of sale and mortgage and, as incidental thereto, power to revoke the uses declared by the will. On the 19th of November 1862 the trustees executed a legal mortgage of the land in question together with other land to Sir F. D. Legard to secure £9000 with interest. The mortgage contained a proviso of redemption under which the property was to be reconveyed "according to the ownership of the equity of redemption of the same premises." By deed of the 30th of January 1883 the surviving trustee of Surtees' will, having apparently forgotten that the land in question was included in the mortgage to Legard, conveyed it to Toward who had no notice of the mortgage. The conveyance recited a contract to sell the land free from incumbrances for £1060, and contained the usual covenant by the trustee that he had not incumbered. The title-deeds (which for some unexplained reason had not been deposited with Legard) were handed to Toward.

On the 15th of February 1883 Toward mortgaged the land in question to the appellants to secure £2500 and interest,

(1) [1891] 1 Ch. 8.

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representing that he had bought the land from the trustees of one Smithson and producing in support of his title a deed which was in fact forged. The circumstances under which the appellants accepted the title are fully stated in Lord Macnaghten's judgment.

By deed of the 20th of October 1887 Toward mortgaged the land in question to the respondent Russell to secure £2500 and interest, Russell having no notice of the appellants' mortgage. On this occasion Toward disclosed to Russell his real title as derived from Surtees' trustee and handed to Russell the title-deeds.

In 1888 Toward absconded and the respondent Russell, having discovered the fact of the appellants' mortgage, induced the trustees of Sir F. D. Legard's will, in whom the legal estate of the land in question was vested, to convey it to the Surtees' trustees upon the express condition agreed to between them and the Legard trustees that the Surtees' trustees would immediately thereafter convey the legal estate to Russell. Accordingly on the 21st of November 1888 the trustees of the will of Sir F. D. Legard executed a deed of that date by which—after reciting that they had been requested by the trustees of Surtees' will to release the land in question from the mortgage of the 19th of November 1862 and that being satisfied that their mortgage debt was otherwise sufficiently secured they had agreed to do so—they conveyed the land in question to the trustees of Surtees' will to the uses upon the trusts and with and subject to the powers and provisions of Surtees' will, or such of them as were then subsisting and capable of taking effect. By a deed of the 26th of November 1888 the trustees of Surtees' will in pursuance of a request by the respondent Russell conveyed the land in question to him subject to the equity of redemption subsisting by virtue of the mortgage of the 20th of October 1887. The Surtees' trustees before executing the deed of the 26th of November had been (as Kay J. found) informed of the appellants' mortgage.

In 1889 the appellants brought an action against Russell and the other respondent (who claimed under Russell's title), claiming a declaration that the appellants were first mortgagees

of the land in question and to have their security of the 15th of February 1883 realized. The action was tried before Kay J. who made a declaration and order in favour of the plaintiffs (1), but that decision was reversed by the Court of Appeal (Sir J. Hannen, Bowen and Fry L.JJ.) (2).

1891. Dec. 10, 11. *Haldane* Q.C. and *Levett* Q.C. for the appellants:—

This is a case where two innocent mortgagees have been defrauded by the mortgagor and the question is which is to suffer. On the execution of the mortgage to the appellants on the 15th of February 1883 they took such interest as the mortgagor could convey, viz. an equitable estate in fee simple, the legal estate being in Legard's trustees under the mortgage to Legard from Surtees. On the execution of the mortgage to the respondent Russell on the 20th of October 1887 he became second equitable mortgagee. The respondent Russell now claims to have priority over the appellants, the first equitable mortgagees, by reason of the legal estate having been conveyed to him, and also on the ground of the appellants' negligence.

With regard to the first point equity will not permit such a transaction to defeat the first mortgagees where the legal estate has been conveyed in breach of duty. Legard's trustees in whom the legal estate was were not bound to release this land from their mortgage, but if they did they were bound to convey to the persons entitled to the equity of redemption, i.e. the appellants. Surtees' trustees had notice of the appellants' title and conveyed the legal estate to the respondents in breach of their duty which was to convey it to the appellants. A mortgagee may transfer his security as he pleases: he may sell under a power of sale; he may enter into possession; and perhaps sub-mortgage: but subject to this he simply owns a charge and is a trustee for the mortgagor or the owner of the equity of redemption. No doctrine is better established than this, that in equity a mortgage is regarded simply as a charge; an equity of redemption is considered as an estate in the land; "the person entitled to the equity of redemption is considered as the owner of

(1) [1891] 1 Ch. at p. 20.

(2) [1891] 1 Ch. 8.

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the land"; so that the husband of a feme mortgagor is tenant by courtesy; and "it is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, videlicet with regard to the inheritance, he certainly is till a foreclosure"; *Casborne* v. *Scarfe* (1) per Lord Hardwicke. This doctrine was entirely disregarded by Legard's trustees and by Surtees' trustees. A satisfied mortgagee has no right to convey the legal estate to a stranger: he is a bare trustee for the owner of the equity of redemption. True, the appellants could not call on Legard's trustees to release to them but they were entitled to say "if you do release release to us." Beyond his debt a mortgagee has no interest in the land. In equity the contract "is considered a mere loan of money, secured by a pledge of the estate"; *Seton* v. *Slade* (2) per Lord Eldon. The land follows the debt: the land is a mere security; *Thornbrough* v. *Baker* (3). The mortgagee's only right as to the rents or as to sale is to pay himself his debt: beyond that he is an absolute trustee for the mortgagor; *Matthison* v. *Clarke* (4) per Kindersley V.C. A mortgagee cannot in equity without the mortgagor's concurrence release a vendor, from whom the mortgagor purchased, from his covenant for quiet enjoyment; *Thornton* v. *Court* (5).

An equitable incumbrancer cannot after receiving notice of a prior incumbrance obtain priority over it by getting in a legal estate from a bare trustee: *Harpham* v. *Shacklock* (6), where Jessel M.R. said "Nothing is better settled than that you cannot make use of the doctrine of 'tabula in naufragio' by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." The origin of the phrase "tabula in naufragio" is given in the notes to *Marsh* v. *Lee* (7). Where money is lent on an equitable mortgage without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after notice that his mortgagor has made himself trustee for the owner of the prior equity; nor would he be in any better position

(1) 1 Atk. 603.
(2) 7 Ves. 265, 273.
(3) 2 Wh. & T. L. C. Eq. 1166, 1169 (6th ed.).
(4) 3 Drew. 3.
(5) 3 D. M. & G. 293.
(6) 19 Ch. D. 207, 214.
(7) 1 Wh. & T. L. C. Eq. 700, 701 (6th ed.).

if he had no notice; *Mumford* v. *Stohwasser* (1) per Jessel M.R.; and see *Cory* v. *Eyre* (2) per Turner D.J.

The doctrine of tacking is highly technical and the Courts have frequently said they will not extend a doctrine which has the effect of squeezing out an innocent prior mortgagee, and that it was a great misfortune it was ever introduced: see per Lord Blackburn in *Jennings* v. *Jordan* (3). There is no case in the books where the doctrine of tacking has been applied to such circumstances as the present. Strictly speaking, tacking means tacking one equitable security to another, not tacking the legal estate to an equitable security, and here by the hypothesis the equitable security is gone. It is not clear that Legard's trustees ought in any case to have conveyed the legal estate to Surtees' trustees. Surtees' trustees were not in the ordinary position of freeholders: they had power to raise money by revoking the uses declared by the will, and the reconveyance if made to them ought to have been to the same uses as the original settlement. Legard's trustees were not justified in conveying otherwise than to the person entitled to the ownership of the equity of redemption. They are at least in no better position than if they had reconveyed directly to the respondent Russell, and that would clearly have been wrong. They might not have been liable in damages for so doing, but a Court of equity will not help an equitable mortgagee who so acquires the legal estate. Legard's trustees being trustees for the owner of the equity of redemption subject to the charge, the moment their security ceased to exist as to the property in question the owner of the equity of redemption became absolute owner of that part freed from the charge, and Surtees' trustees and the respondent Russell became in succession trustees for the appellants. A mortgage debt cannot be split: nor can the land be split. The respondent Russell having become trustee for the appellants could not set up his own title to the appellants' prejudice. The mortgage to the appellants had the effect of reading their names into the deed of 1862 by which Surtees' trustees mortgaged to Legard's trustees with a proviso that the reconveyance should be "according to the

(1) Law Rep. 18 Eq. 556. (2) 1 D. J. & S. 149, 167.

(3) 6 App. Cas. at p. 714.

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ownership of the equity of redemption of the premises." What right had Surtees' trustees to prefer the second mortgagee to the first and to take away the appellants' equitable estate and give it to another? The surviving trustee had already made a mistake in conveying to Toward as if he had not incumbered, and he had covenanted with Toward that he had not incumbered. It is said that the reconveyance to Surtees' trustees was on the condition that they should convey to the respondent Russell. That is like paying trust money with a condition to pay it over to some person not entitled. Assuming even that Legard's trustees could have properly conveyed to the respondent Russell, they did not; they did it through Surtees' trustees, and having taken the conveyance in that channel the respondent Russell must suffer for it. It is no answer to say that he might have got rightly by a direct conveyance from Legard's trustees—assuming for the sake of argument that he might. The reconveyance was to Surtees' trustees in fee simple to the uses and on the trusts of Surtees' will: that was in trust for the appellants as owners of the equity of redemption. The agreement by Surtees' trustees to pass on the legal estate to Russell was a breach of trust. It was an agreement which Russell could not have enforced. If Surtees' trustees had refused to carry out the agreement they would have committed no breach of trust; only a breach of contract. Possibly they might have been compelled to reconvey to Legard's trustees but they were not. For five days—from the 21st to the 26th of November 1888—the legal estate was in Surtees' trustees, and during that time the rights of the appellants as cestuis que trust were subsisting and Surtees' trustees were bare trustees for them. On the 26th they conveyed to Russell but they could not so defeat vested rights.

As to the alleged negligence, to postpone a first equitable mortgagee to a later the negligence must be "gross and wilful which in the eye of this Court amounts to fraud": see the observations of Lord Selborne in *Dixon* v. *Muckleston* (1); such negligence in fact as amounts to estoppel. In other words, the negligence must either itself amount to fraud or be gross and be the means of enabling the mortgagor to defraud the later

(1) Law Rep. 8 Ch. 155, 161.

mortgagee; *Colyer* v. *Finch* (1); *Roberts* v. *Croft* (2); *Cory* v. *Eyre* (3).

J. Scott Fox and *Eastwick* for the respondents were not heard.

The House took time for consideration.

1892. March 28. LORD HERSCHELL:—

My Lords, the question raised in this action is whether the appellants are entitled to a first charge as mortgagees of certain hereditaments comprised in an indenture of mortgage dated the 15th of February 1883. The learned judge who tried the action declared them to be so entitled, but his decision was reversed by the Court of Appeal. The case is one of that unfortunate class where one of two innocent parties must suffer from the fraud of a person with whom they have dealt. Thomas Toward, whose frauds have led to this litigation, executed on the 15th of February 1883 an indenture of mortgage conveying to the appellants the property now in question to secure an advance of £2500. The title which he purported to shew was a deed of conveyance of the property to himself from the trustees of one Samuel Smithson. The signatures of the trustees were in fact forgeries, and the land had never formed part of the Smithson estate. The appellants were content to take the title without further inquiry, because they had shortly before become the mortgagees of certain other hereditaments in the same neighbourhood, conveyed to Toward by Smithson's trustees, an had then investigated the title and had no reason to suspect that the forged deed was otherwise than genuine.

Thomas Toward had in fact acquired the land in question from the trustees of Robert Surtees by a conveyance dated the 30th of January 1883. On the 20th of October 1887 he mortgaged it to the respondent, Arthur Henry Russell, to secure an advance of £2500, shewing in his abstract the real title and handing over the deeds to the respondent. I have said that Thomas Toward had acquired the land by conveyance from Surtees' trustees, but he did not in fact obtain the legal estate,

(1) 5 H. L. C. 905, 928. (2) 24 Beav. 223; 2 D. & J. 1.
(3) 1 D. J. & S. 149, 167.

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although so far as appeared from the conveyance and abstract of title he did so. By an indenture dated the 19th of November 1862 the trustees under the will of Robert Surtees had conveyed a considerable quantity of land, including the piece in question, by way of mortgage to Sir Francis Legard to secure the sum of £9000 and interest. This mortgage was outstanding at the date of the conveyance to Toward and was apparently overlooked. The result was this, that although both the appellants and the respondent Russell thought they had obtained the legal estate, neither of them had in fact done so. But inasmuch as at the date of his conveyance to the appellants Toward had an equitable estate subject to the mortgage to Sir F. Legard, the appellants obtained a good equitable title. And their title being of earlier date than the equitable title of the respondent Russell would undoubtedly on that ground have had the priority but for what subsequently happened. I say this of course apart from the question of negligence, on which ground also the respondent contends that the appellants' security must be postponed to his.

When Toward's frauds became known the respondent Russell, having ascertained the existence of the outstanding mortgage, approached the representatives of Sir F. Legard, and applied to them to release the land in question from the mortgage debt secured by the indenture of November 1862, and to convey or cause to be conveyed the legal estate in the same to the respondent. Sir F. Legard's representatives, being satisfied that the remainder of the property comprised in the mortgage was sufficient security for the sum due to them, agreed to take this course. It was accordingly arranged that they should convey the legal estate to the Surtees' trustees discharged from their mortgage debt, upon the express condition that they should thereupon convey the legal estate in the premises comprised in the respondent's mortgage to him. The Surtees' trustees assented to this arrangement, which was accordingly carried out by two indentures. By one, of the 21st of November 1888, the Legard trustees conveyed to the Surtees' trustees, who in turn by an indenture of the 26th of November of the same year conveyed to the respondent.

The respondent thus became possessed of the legal estate in the premises comprised in his mortgage, and it is on this (apart from the question of negligence to which I have already alluded) that he bases his claim to priority over the appellants whose equitable interest was prior in point of time to his own. It is not disputed that the doctrine of equity is well settled, "that a man who has bonâ fide paid money without notice of any other title, though at the time of the payment he as purchaser gets nothing but an equitable title, may afterwards get in a legal title if he can and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." I am using the language of Lord Selborne when delivering the opinion of the Judicial Committee in the case of *Blackwood* v. *London Chartered Bank of Australia* (1). It is said that there is engrafted upon the rule of equity this exception, that the possession of the legal estate cannot be insisted upon as against a prior equitable incumbrancer where it was obtained from one who held it merely as trustee. The language of the late Master of the Rolls in *Harpham* v. *Shacklock* (2) was strongly relied on in support of this view. His words were: "Nothing is better settled than that you cannot make use of the doctrine of tabula in naufragio by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." It is not necessary for your Lordships to determine whether this view is in accordance with the authorities, but I am content to assume it to be well founded. Where the person in whom the legal estate is vested stands in the relation of trustee to the prior incumbrancer, it would certainly be strange if a subsequent incumbrancer with notice of these facts could secure any advantage by obtaining a conveyance of the legal estate to himself.

The appellants put their case in this way: They say that by the indenture of mortgage of February 1883 the equity of redemption which had passed to Toward by the deed of January 1883 became vested in them, and that they thus had an equitable estate in fee simple subject to the mortgage to Legard. And

(1) Law Rep. 5 P. C. at p. 111. (2) 19 Ch. D. 207, 214.

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further that Toward as between himself and the trustees was entitled to a conveyance of the legal estate of the property freed from the mortgage of November 1862, and that this right passed to them. These propositions are not open to contest. Their next position is that when the legal estate became vested in the Surtees' trustees by virtue of the conveyance of the 21st of November 1888 they became trustees of it for the appellants, and that the respondent has thus obtained the legal estate from bare trustees who were bound to convey it to the appellants. But for the circumstances under which that conveyance took place, this might well be so. But it must be taken as proved that the legal estate was conveyed to the trustees of Surtees' will at the request of the respondent Russell, "and only upon the terms and express condition agreed to between them the said trustees and the successors in title of Sir F. Legard that they the said trustees would immediately thereafter convey the said premises and the legal estate therein" to him. The representatives of Sir F. Legard being under no obligation to convey to the Surtees' trustees, and having made the conveyance only on the condition and for the purpose mentioned, the learned counsel for the appellants were forced to admit that their clients could not successfully have invoked the aid of a Court of Equity to compel a conveyance to themselves. They equally failed to establish that the appellants could have obtained an injunction to prevent the conveyance to the respondent. Whether there was to be a conveyance to the Surtees' trustees or not was a mere question of the machinery by which the arrangement between the respondent and Sir F. Legard's representatives was to be carried out, and I am of opinion that the matter must be dealt with upon the same footing as if the conveyance had been made directly from those representatives to the respondent.

The controversy therefore resolved itself into this: was there anything in the circumstance that the legal estate was obtained from Legard's representatives which precludes the respondent from claiming the benefit of it as against the appellants? It was contended on their behalf that inasmuch as they were the owners of the property subject to the mortgage Legard's representatives were trustees for them, and that in conveying to the

respondent Russell without consideration they were guilty of a breach of trust to which he was a party, that if they were satisfied with less than the entire property comprised in their security it was only to the appellants that they could lawfully release any part of it. No authority was cited for the proposition that a mortgagee is, subject to his security, a trustee of the legal estate for the mortgagor. The rights of a mortgagor are no doubt well established in a Court of Equity. He may redeem the mortgage, and no dealings with the property by the mortgagee, save a conveyance under the power of sale, can deprive him of this right. But it is quite a different proposition and one which I think is wholly untenable to assert that a mortgagee is trustee for the mortgagor.

It is admitted that a mortgagee may create such estates as he pleases, he may convey, by way of sub-mortgage, to whom and in as many parcels as he pleases. This seems to me to shew that Legard's representatives cannot be regarded as holding the legal estate as trustees for the appellants. If the conveyance to the respondent was a breach of trust on the part of Legard's representatives, as against the appellants, they could I presume have come to a Court of Equity for an injunction to prevent the conveyance being executed. But had they done so, the answer would surely have been, "Come and redeem: that is the right which you possess, and you are not entitled, whilst abstaining from the exercise of that right, to restrain Legard's representatives from dealing with the legal estate vested in them." I am quite unable to see that Legard's representatives committed, as against the appellants, any breach of trust or other wrong of which they are in a position to complain. And this being so, the respondent in taking the conveyance was not a party to any breach of trust or other wrong. The case is a novel one. But I do not think that the appellants have brought themselves within any established exception to the rule that a subsequent incumbrancer without notice who has got in the legal estate may hold it as against one whose equitable title is prior in point of time. And I am unable to see any equity in the appellants entitling them to insist that the respondent shall not enjoy the advantage derived from the possession of the legal estate.

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The view which I take renders it unnecessary for me to express an opinion upon the other ground upon which the respondents rely, viz. the alleged negligence of the appellants.

I am of opinion that the judgment of the Court below was right, and that this appeal should be dismissed with costs.

The Lord Chancellor, who heard the leading counsel for the appellants and a great part of the argument of the junior counsel, does not take part in the judgment as he did not hear the whole of the argument. He desires me, however, to say that nothing that he heard satisfied him that the judgment of the Court below was otherwise than correct.

LORD MACNAGHTEN:—

My Lords, there are no facts in dispute in this case, though much is left to inference and conjecture, which the appellants might have cleared up if they had thought fit to do so.

The author of the mischief which has given rise to the present controversy was one Thomas Toward, of Shildon, in the county of Durham, a builder by trade, and a man certainly of more ingenuity than honesty.

Toward absconded some time in the year 1888—the precise date is not given, but it was stated at the Bar that it was in the month of August—and thereupon, or shortly afterwards, he was declared bankrupt.

On Toward's disappearance it was discovered that he had contrived to mortgage a small property in the town of Old Shildon twice over for its full value—first, to the appellants, and then to the respondent Russell, a solicitor in York, who is interested in the mortgage on his own account, and on account of his partner, the respondent Mackay.

The property belonged at one time to a gentleman of the name of Surtees, who died in 1857. Mr. Surtees devised his real estate in strict settlement. The trustees of his will, who were devisees to uses, had under the will powers of sale and mortgage, and, as incidental thereto, power to revoke the uses declared by the will.

On the 30th of January 1883 the surviving trustee of Surtees' will, with the concurrence of the tenant for life, conveyed the property in question, together with a plot containing 820 square

yards, making in all 2A. 2R. 1P. to Toward in fee, in consideration of £1060, and the title-deeds of the property, which it seems Mr. Surtees had acquired by purchase, were handed over to him.

In April 1883 Toward conveyed the 820 square yards to the trustees of a Methodist Chapel. He built some houses on the rest of the property and mortgaged it more than once. Ultimately, on the 20th of October 1887, he conveyed it to Russell by way of mortgage, for the purpose of securing an advance of £2500, out of which a prior mortgage had been discharged. On the occasion of this mortgage to Russell, the title was carefully investigated. On the completion of the transaction, the title-deeds of the property, which had been in the hands of Russell's firm on behalf of the prior mortgagee, were retained and held by him on behalf of himself and Mackay; and in his hands they have remained ever since. Not only had Russell no notice of any prior charge, but it is clear that no skill or diligence on his part could have detected any flaw or defect in the title.

The circumstances attending the mortgage to the appellants are more interesting. On the 27th of April 1881 Toward, who was then represented by a respectable firm of solicitors, mortgaged to the appellants a house in the neighbouring village of New Shildon, which the trustees and the beneficial owner under the will of a Mr. Smithson had conveyed to him by an indenture dated the 21st of August 1878. It seems that on the occasion of this mortgage Toward, with an eye to future business, took the precaution of keeping a copy of the conveyance to him. In January 1883, when he was in treaty with the trustee of Surtees' will, he applied to the appellants without the intervention of a solicitor, for an advance of £2500 on mortgage. The appellants, through their solicitors, asked for an abstract of title. He furnished them with an abstract of a deed purporting to be dated the 3rd of November 1882, and to be a conveyance to him from the Smithson trustees and the beneficial owner under Smithson's will in consideration of £1500. The appellants, through their solicitors, then desired to compare the abstract with the deed abstracted, and Toward produced to them a document in the form of a deed, which he had fabricated, by taking everything except the parcels and the date from his copy of the conveyance

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of the 21st of August 1878, and inserting as the parcels a description more or less accurate of the property which he was purchasing from the trustee of Surtees' will, and forging thereto the names of the Smithson trustees, and the name of the beneficial owner under Smithson's will.

Beyond comparing the abstract with the forged deed the appellants made no investigation of Toward's alleged title; they made no inquiry for the purpose of ascertaining whether the property formed part of the estate devised by Smithson's will; nor did they call for the production of the earlier title-deeds, although the forged deed on the face of it referred to a covenant to be executed by the beneficial owner under Smithson's will for the production of title-deeds. According to their own account they were favourably impressed by the shortness of the title, and they were satisfied that the property which Toward offered them in the town of Old Shildon was part of the Smithson estate, because as they say they had been assured by Toward's solicitors on the previous occasion that "the greater part of New Shildon was built upon land sold off by Mr. Smithson."

The mortgage to the appellants was dated the 15th of February 1883, and it is not disputed that it operated to pass the estate and interest which Toward had acquired on the 30th of January preceding.

The appellants and the respondents each supposed that their own mortgage was a first charge and protected by an assurance of the legal estate. It turned out, however, that the legal estate was outstanding, although the fact had escaped notice until after Toward's disappearance. It seems that on the 19th of November 1862 by a deed of that date the Surtees trustees, with the concurrence of the then tenant for life, had conveyed the property afterward sold to Toward, together with other property of much greater value, to one Sir Francis Legard in fee by way of mortgage for the purpose of securing £9000, of which £3000 was paid off in 1887. By some oversight the title-deeds of the property afterwards comprised in Toward's purchase were not handed over to the mortgagee, and the fact that the property was in mortgage was overlooked when it was sold and conveyed to Toward.

After Toward's disappearance Russell took possession of the

property in question in this action, and then finding that the appellants claimed priority under a mortgage of earlier date, he applied to the trustees of Sir Francis Legard's will, in whom the mortgage of 1862 was vested, and induced them to convey the property to the Surtees trustees upon the express condition agreed to between them and the Surtees trustees that the Surtees trustees would immediately thereafter convey the legal estate to him. This arrangement, the terms of which are not in dispute, was carried out by two deeds—a conveyance of the 21st of November 1888 from the Legard trustees to the Surtees trustees, with the consent of the tenant for life under Surtees' will, and a conveyance of the 26th of November 1888 from the Surtees trustees to Russell.

It is admitted that by this transaction Russell acquired the legal estate, and it is not disputed that an equitable mortgagee who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate unless the circumstances are such as to make it inequitable for him to do so, as would be the case, for example, if the legal estate were held upon express trusts or, according to recent authorities, if it were vested in a satisfied mortgagee.

The mere fact that the subsequent incumbrancer has notice of the prior incumbrance when he gets in the legal estate counts for nothing. "It is," as Lord Hardwicke says (1), "the very occasion which shews the necessity of it."

It is therefore incumbent upon the appellants who were the plaintiffs in the action to shew that Russell acted inequitably in getting in the legal estate, or that there is some equity which prevents him from availing himself of its protection.

In considering the circumstances under which the legal estate was got in, it would, I think, be a mistake to attribute to the persons concerned in the transaction the knowledge which we now possess, whether the possession of that knowledge would or would not have affected their position.

The first question in my opinion is, what did the Legard trustees know about the facts of the case? It is not alleged in the pleadings or in the evidence, nor has it been suggested at the

(1) 2 Ves. 574.

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Bar, that they knew anything about the appellants or their claim to be mortgagees of the property. Observations were made upon their conduct, as if they had officiously meddled in a quarrel which did not concern them, and had given or had attempted to give some advantage to one of two competing claimants, out of mere caprice or possibly through some misapprehension of the real state of things. That is not I think the true view of the case. One has in some degree to guess at the facts, because the appellants on whom the burden of proof lies have not chosen to go into evidence about them. But taking everything most strongly in favour of the appellants, it seems to me that no fault can be found with the action of the Legard trustees. They were applied to by a person who had apparently been misled through the negligence of their predecessor in title, and who had advanced his money without notice on the security of a small portion of the property mortgaged to them. They did not require that portion for the purposes of their own security. Why should they not hand it over to the applicant? He had a mortgage perfect on the face of it, and possession of deeds shewing a good title for sixty years. The Surtees trustees consented; so did the tenant for life under Surtees' will, and as far as I can make out, the Legard trustees knew nothing whatever about anybody else in connection with the property. Notwithstanding the very able arguments addressed to us, I cannot see anything in their position as mortgagees to oblige them to play the part of the dog in the manger, and keep what they did not want themselves from a person who seemed to have a very good claim to it.

The next question is what did Russell know? It is conceded that he knew that the appellants claimed priority on the ground of having a mortgage prior in date to his. More than this, he cannot, I think, be taken to have known. There is no reason to suppose that the appellants had explained to him the circumstances which they now contend excused them from obtaining the title-deeds of the property. It would have been strange if they had. They do not appear to have known the circumstances themselves. They did not even take the trouble to make themselves acquainted with the facts when they put in their statement of claim four months afterwards. The case made in

their pleadings was that Russell only obtained possession of the title deeds to the premises under the conveyance of the 26th November 1888. In fact the appellants seem to have displayed no greater diligence after Toward absconded than they did when they took their security. Russell certainly knew that there were claimants prior to him in date. But he also knew that those claimants could not have a single title deed relating to the property except their alleged mortgage. That circumstance unexplained would affect their claim to priority. Why was Russell to assume that it was capable of explanation when the persons interested did not choose to come forward and explain it? So long as it is the settled rule of the Court that a subsequent incumbrancer may gain priority by getting in the legal estate, and that there is nothing in itself inequitable in so disarranging equities, I do not see how it can be contended that there was anything contrary to equity, or anything involving a breach of trust or a breach of duty in the transfer of the legal estate from the Legard trustees to Russell.

But then it is said that the legal estate passed through the hands of the Surtees trustees, and that they were trustees for the appellants in a sense. I am not quite sure that I know what that expression exactly means. But of this I am sure, that it is only when the legal estate has been acquired from a trustee in the proper sense of the term that the acquisition of it has been held of no avail. And certainly the Surtees trustees were never trustees of this property for the appellants; they were only devisees to uses under Surtees' will; they never had the legal estate until it was conveyed to them on a special trust or confidence to hand it over to Russell. In point of fact, I think they may be left out of the question altogether. The case seems to me to be precisely the same as if the legal estate had been conveyed directly by the Legard trustees to Russell. It is not clear why recourse was had to the interposition of the Surtees trustees, or why the conveyance to them took so singular a form. It may be, as suggested in the respondent's case, that that course was adopted with the view of affording protection to the trustees of the Methodist Chapel, whose property was also included in the appellants' mortgage. At any rate it is no part of the appellants' case that the

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particular machinery which was made use of was designed to embarrass or defeat their claim.

My Lords, on these simple grounds, without discussing the doctrine of Tabula in naufragio, or attempting to define the limits of its application, which it appears to me would be no easy matter having regard to the current of modern authority, I think the appeal must be dismissed. The appellants have not succeeded in shewing that Russell has done anything inequitable or improper in getting in the legal estate.

This view of the case renders it unnecessary to consider what would have been the priority of the parties if the legal estate had not been got in. That question was not fully discussed, and I prefer to leave it undetermined. I will only say that I am satisfied that on the part of the appellants there was an amount of negligence which it is difficult to excuse or understand; and I am not at present convinced of the correctness of the view expressed by the learned judge who tried the case in the first instance, that negligence necessary to postpone a prior equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed on the second mortgagee, and that in fact it is immaterial in such cases whether the prior mortgagee has or has not the legal estate.

LORD WATSON :—

My Lords, I have had an opportunity of considering the opinion which has just been delivered by my noble and learned friend opposite (Lord Macnaghten), and I entirely concur in it.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 28th March 1892.

Solicitors for appellants: *C. & S. Harrison & Co.*
Solicitors for respondents: *Iliffe, Henley & Sweet.*

[HOUSE OF LORDS.]

PICKARD & CURREY AND OTHERS . . . APPELLANTS; H. L. (Sc.)
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AND
GEORGE PRESCOTT . . . . . RESPONDENT. *March* 11.

Patent—Prior Publication—Foreign Publication sold in this Country.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland, dated the 9th of July, 1890, which held invalid, on the ground of prior publication in a foreign magazine published in this country, the appellants' letters patent for improved pince-nez, or double eye-glass.

The question was as to inferences to be drawn from the facts; and, as the case is fully reported in the Court of Session (1), a mere note of the result of the appeal is deemed sufficient.

On appeal,

March 10, 11. *Moulton*, Q.C., and *J. Boyd* (of the Scotch Bar), (with them, *A. Statham*), heard for the appellants.

[They cited *Plimpton* v. *Malcolmson* (2); *United Telephone Company* v. *Harrison, Cox-Walker & Co.* (3); *Lang* v. *Gisborne* (4); and *Plimpton* v. *Spiller* (5).]

The Solicitor General for Scotland (*A. Graham Murray*, Q.C.), and *W. C. Smith* (of the Scotch Bar), for the respondent, were not called upon.

THE HOUSE (Lord Halsbury, L.C., and Lords Watson, Morris, and Field) affirmed the decision of the Court of Session; and dismissed the appeal with costs.

Lords' Journals, 11th March, 1892.

Agent for appellants: *W. L. Cooper, for William Boyd, W.S., Edinburgh.*

Agent for respondent: *G. Dickinson Byfield, for T. Temple Muir, S.S.C., Edinburgh.*

(1) 17 Court Sess. Cas. 4th Series (Rettie), 1102; 27 Sc. L. R. 933.
(2) 3 Ch. D. 531.
(3) 21 Ch. D. 720.
(4) 31 Beav. 133.
(5) 6 Ch. D. 412, at p. 435.

[HOUSE OF LORDS.]

H. L. (Sc.) 1892 March 31.

JAMES RENEY . . . . . APPELLANT;

AND

THE MAGISTRATES OF KIRKCUDBRIGHT RESPONDENTS.

[REVERSED.]

Ship—Reparation—Negligence of Harbour-Master—Alleged Contributory Negligence of those on Board.

When a vessel is within the jurisdiction of the harbour-master by law empowered to give compulsory orders, and he is giving his orders as to the place of anchorage or otherwise, it is only in the last resort, when the danger of following such orders is fully obvious that those on board are at liberty to disregard the orders, even though they may be under the impression that the harbour-master is making a mistake.

The sailing ship *Janets and Ann* was coming into Kirkcudbright Dock when she ran on a bank at the west pier, which was covered with water, and was damaged. At the time of the accident the vessel was within the jurisdiction of the harbour-master, and was coming in under his orders. The master of the ship was at the helm in charge of the ship, and was assisted in the navigation by two local fishermen, who were aware of the bank; but the master was ignorant of it. The harbour-master stood on the west pier and ordered the ship to "come on," being unaware it was then an ebb tide, when to sail into the dock was a dangerous operation. The master in obeying the order ported the helm, and the ship gradually approached the shore. One of the fishermen hailed the harbour-master, "Be sure to tell us when to let go the anchor." The order again was "Come on;" and then, too late to avoid the grounding, the harbour-master perceived his mistake, and ordered the anchor to be let go. It was admitted by the harbour-master that his intention was to bring the ship into the dock by sailing without warping; and that he did not know the tide was ebbing until after the ship had grounded:—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 294), that the harbour-master was alone to blame, and that there was no contributory negligence on the part of the master who was in charge of the ship; and the failure of the persons on board who knew of the danger to inform the master did not absolve the harbour-master from the consequence of his negligence.

APPEAL against a decision of the First Division of the Court of Session, Scotland, which reversed the judgment of the Lord Ordinary (1).

The action was brought by James Reney, the appellant, against the magistrates of Kirkcudbright for damage sustained

(1) 18 Court Sess. Cas. 4th Series (Rettie), 294.

by the appellant's schooner *Janets and Ann* through the alleged negligence of the respondents' harbour-master. It was not disputed that those on board the ship were bound to obey the orders of the harbour-master (10 & 11 Vict. c. 27, ss. 52 to 68, incorporated by 16 & 17 Vict. c. 93). The dock of the harbour in question lies on the south bank of the River Dee, and is entered by two piers. About 150 yards below the dock is Moat Brae, and some distance above the dock is a bridge. From the lower or western pier a beach runs out into the channel. The extent of the latter varies with the tide. It is usual for ships bound for the dock to be brought to anchor about Moat Brae, and then to be warped into the dock. Ships have been sailed into the dock without anchoring, but only on a flood tide.

It appeared from the evidence that the effect of a flood tide was to keep the ship away from the bank, and the effect of an ebb tide to drive her on; that the master had been in the harbour only once nine years before; that there were no licensed pilots, but the master had taken on board two local fishermen, Smith and Poland, to assist in the navigation of the ship; that on arrival of the ship with her sails down opposite Moat Brae in mid-channel bound for the dock, her master being at the helm in charge, Smith hailed the harbour-master, who was standing on the west pier, and who could see all that was being done on board the ship, to tell them when to let go the anchor; that the harbour-master ordered the ship to "come on," waving his arm from left to right or towards himself; that the master believing the signal was to come nearer to the dock ported his helm, and, while the ship was gradually approaching in shore under port helm, Smith again hailed the harbour-master, "Mind you tell us when to let go the anchor;" that the harbour-master again gave the order "Come on," being in ignorance that the tide was on the ebb, and then when too late he ordered the anchor to be let go. The ship grounded on the beach and was damaged.

The harbour-master admitted that he did not know that the tide was ebbing until after the vessel had grounded, and that what he had intended was to bring the ship into the dock by sailing without warping. An ebb tide had a tendency to drive the ship on the beach. Smith and Poland knew of the beach

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which was covered at the time of the accident with water and that the tide was on the ebb, but they did not think it their place to interfere in presence of the harbour-master.

The First Division, on the 19th of December, 1890, recalling the Interlocutor of the Lord Ordinary (Lord Trayner), dated June 11, 1890, held, that the fault of the harbour-master led directly to the stranding of the vessel, but found further, that the persons in charge of the navigation of the ship were in fault in porting the helm, and their contributory negligence conduced to the accident; they therefore assoilzied the respondents and found them entitled to costs. (1)

On appeal,

March 29, 31. *W. R. Kennedy, Q.C.* (with him *J. G. Witt, Q.C.*), for the appellant:—

The appellants were entitled to recover. The ship was under the jurisdiction of the harbour-master, and the master in charge of the ship was liable to a penalty if he did not obey the signal of the harbour-master. There was also no doubt that the harbour-master was negligent in not knowing, when he gave his orders, that the tide was on the ebb. On the other hand, there was no contributory negligence on the part of those on board. The master had reasonable grounds for believing that the harbour-master meant by his signal to order the porting of the helm. If he misunderstood the order, it cannot be said he was guilty of negligence. The harbour-master should have made his orders clear. Besides, he saw that the ship was about to port her helm, and if that was a misinterpretation of his order, he did not give proper directions, but still delayed. The local fishermen on board knew of the danger, but it was not their duty to interfere in the presence of the harbour-master.

The Solicitor-General for Scotland (*A. Graham Murray, Q.C.*, with him *G. L. Crole*, of the Scotch Bar), for the respondents:—

The damage was not caused by the orders of the harbour-master, but by negligence in the execution of such orders. The

(1) 18 Court Sess. Cas. 4th Series (Rettie), 294.

blunder was the porting of the helm. Those in charge of the ship should have kept up the stream or have starboarded again.

[He cited *The Cynthia* (1).]

LORD HALSBURY, L.C.:—

My Lords, the facts of this case are extremely clear, and I entertain no doubt as to the party upon whom the responsibility for the accident rests. This vessel, as I understand the matter, was hindered in her approach to the dock to which she was intended to proceed by reason of going over a bank which is not obvious to anybody not familiar with the place, but which was perfectly familiar to the harbour-master. We start with this concession, about which there can be no doubt, because it is proved by the person who is principally interested in denying it, that the harbour-master was under the impression that the tide was either flood tide or slack water. The next proposition which is established by the harbour-master is that the manœuvre which he had intended the vessel to execute was not to anchor at all, but to come straight into the dock. Now that immediately raises this question. It is clear that if the tide had been flood tide, the operation of the tide would have kept the vessel away from the shore, even although she was under a port helm. The question is a question of yards, so that a yard or two one way or the other would make the whole difference.

The harbour-master's own account of the transaction is that he saw the vessel, and he would know that she was under a port helm. Now the harbour-master says: "I intended her to be in the middle channel, and to keep her so that she would be perfectly safe, and therefore what I intended to do was to tell her to keep off, and I afterwards intended to give her further directions when she should be sufficiently level with the entrance to the dock—my intention was to make her keep off." He carries out that intention by directing her to come on. I omit, for the moment, the particular direction which he gave. I do not think

(1) 2 P. D. 52. Compare *The Bilboa*, Lush. (Adm.) 149; *The Belgic*, 2 P. D. 57, n.; 3 Asp. (N.S.) 348; *The Excelsior*, Law Rep. 2 A. & E. 268; 37 L. J. (Adm.) 54; 3 Asp. 151; *The Rhosina*, 10 P. D. 24, 131; 54 L. J. (P. D. & A.) 72; *Owners of The Apollo* v. *The Port Talbot Company* [1891] A. C. 499.

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that anybody (unless you have the situation of all the persons concerned perfectly crystallized so that it cannot be altered) is able to give a proper verbal description of the way in which the harbour-master's hand waved—whether it was right or left, or backwards or forwards; but that everybody on board understood it to be a direction and an obligation to them to come on, to come nearer to the dock, is certain—in fact, there is no denial of it at all. The result was, as a matter of fact, that the vessel, being steered by the master, who knew nothing of the particular obstruction which was ultimately caused to the vessel, was steered in the appropriate and proper way to bring her into the dock, assuming that no such obstruction existed; and the accident happened by reason of the vessel grounding on the bank through that wrong steering.

It is said in the first place that the two persons who were on board (whom I decline to dignify by the name of "pilots," for that is not an appropriate description of them, inasmuch as they were merely fishermen who came on board to assist the captain by their local knowledge), knew of the difficulty. Then comes this question. The original blunder was on the part of the harbour-master, who did not know what the state of the tide was, it being admitted that the state of the tide makes a considerable difference in the direction which ought to be given by the person in charge of the operation. He gave directions which would have been appropriate to one state of the tide, in which the tide was not, but which were perfectly inappropriate to the state of the tide at that time. It is said that the two local pilots (I give them their dignified appellation) ought to have seen that there was danger. Now we must see upon what hypothesis the two local pilots were proceeding. One was under the impression (there can be no doubt about it, not only because they say so, but also because the acts of the persons at the time shew what was thought to be intended) that so far from the vessel being sailed straight into the dock, the vessel was being brought up as near as she could be safely got to the pier head, and was then to drop her anchor, so as to keep the vessel in a proper position for afterwards entering the harbour. Smith called out twice, and the last time in a tone which indicated some anxiety or im-

patience, I think, "Tell me when I am to drop my anchor." Now upon what hypothesis was the harbour-master acting? If, as he says himself, he was under the impression that the vessel was to sail straight in, what was his duty then? Surely, when these local men (upon whom the Solicitor-General for Scotland relied, and as to whom he urged that we were entitled to consider that they would know what the difficulty was), called out to the harbour-master, the harbour-master must have known from their words that the idea in their minds, and in respect of which they must be supposed to have been acting, was first anchoring, and then warping the vessel in. Instead of acting upon that idea, he twice used the words, "Come on." I do not care with what gesture they were accompanied, for everybody concerned was under the impression that he meant the vessel to come on, and she did come on.

Under these circumstances there appears to me to be no doubt as to what was the cause of the mischief and as to who was responsible for it. The harbour-master gave the direction which he did, as he was entitled to do, but I do not think that his evidence and that of another witness are a model of candour. It is admitted that the vessel at that time was under the order of the harbour-master. The effort of the harbour-master is to shew that until the vessel has actually got into the dock his authority does not arise, and that all the functions up to that time belong to those who are on board the vessel. It is not necessary to shew (because it is admitted on the record, and even if it were not admitted on the record, it is quite manifest) that the harbour-master was then, in the exercise of his duty and vocation, giving directions to the vessels which were coming into the harbour—he did give directions to this particular vessel—and, as it appears to me, those directions were implicitly obeyed. I do not understand what direction is supposed to have been disregarded or what negligence is supposed to have been committed. The Solicitor-General said that the direction to come on was negligently obeyed, because they came on under a port helm. What was the thing which was being done? If it was what anybody might suppose, from the harbour-master's statements and directions, was intended to be done, I do not see any

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negligence. The witness said that the place where he expected to anchor, and which was within a few yards of where they did actually anchor, was the usual place to anchor. But, as the Lord President very pertinently observes, if the harbour-master had even then called out in time and had ordered the vessel to be anchored, no accident would have happened. I think that the judgment of the Lord President is confirmatory of the view which I take, because in his judgment he says that the harbour-master eventually gave that direction, but that he ought to have given it sooner than he did. My Lords, if that be the true view of the facts, there does not seem to me to be room for the defence of contributory negligence. The Solicitor-General, with the candour which distinguishes him, rather repudiated the notion of the matter being decided upon the question of contributory negligence at all. In truth there is no question here of contributory negligence. The question is, Who is responsible for what was ordered? Taking one view, the cause of it was the negligence of one set of people, and, taking the other view, the cause of it was the negligence of the other set of people, there being no contributory negligence upon either hypothesis.

Under these circumstances, it appears to me that the cause of the accident is abundantly clear; and the only proposition made here on the other side is a sort of suggestion that the harbour-master had a limited authority by reason of his being aware that those persons who were on board the vessel were more familiar with the local circumstances of the place, and with the navigation, as being fishermen, than he was. My Lords, I think that that would be a very dangerous proposition to lay down. Of course, no one supposes that this is a case of wilfully running against an obstruction; but to say that the harbour-master's authority is limited, or that a person is at liberty to disregard the orders of the harbour-master (who has by law power to give orders) because that person may have the idea in his mind that the harbour-master is making a mistake, would be, to my mind, a most dangerous principle to establish. A double authority would probably in many cases be fatal. Those who have the power to give orders have the right to consider that they will be obeyed. It would, to my mind, be a very strong thing to say that a par-

ticular direction of the harbour-master, in reference to what a vessel shall do, and who is within his right in giving it, should be disobeyed.

I therefore move your Lordships that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Inner House in this case must be reversed, and the decision of the Lord Ordinary restored. The mistake which caused damage to the ship, arose from the vessel porting her helm, in consequence of which she ran on the bank and there stranded. The question is, Who was responsible for that mistake?

Now, when the vessel stranded she was confessedly within the harbour-master's jurisdiction, her own captain being in charge. In the performance of his duty he was assisted by two local fishermen. It seems to me to be clearly proved, and to have been assumed by the learned judges in both Courts below, that the line upon which the vessel was steered by her captain was the very course which the harbour-master by his words and gestures had invited her to pursue. It was suggested in argument by the Solicitor General that, although the captain was ignorant of the danger which following that course as far as the pier would necessarily entail, yet it was known to two persons on board, namely, the fishermen to whom I have referred; and he further argued, that the owner of the vessel was affected by the knowledge of these men. My Lords, I consider that (to say the least of it) to be a very doubtful and dangerous proposition. But I do not think it necessary to consider that point because these two men were not in charge of the vessel at the time. If they had known or understood that the harbour-master intended the vessel to sail straight along the course which I have indicated into the harbour, I think it would have been their duty, seeing the knowledge which they had, to take some steps to prevent that order being followed out. Although they were not in charge, I think it would have been their duty to inform the captain. I do not suggest that their failure of duty in that

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respect, the captain being in charge, would have absolved the harbour-master, or the respondents in this appeal, whose servant he was, from the consequences of his neglect. But these two fishermen were under the impression (a very natural one) that the captain of the vessel had been directed as to the course which was meant to be pursued; but that the vessel would be ordered to come to anchor before reaching the pier, in order that she might subsequently be warped into the harbour. Accordingly, when they reached that point, they made an earnest appeal, or rather, a series of earnest appeals, to the harbour-master, to give them directions, and to let them know when they were to drop their anchor. The harbour-master made no response to these appeals, for this very obvious reason, that at the time when they were made it was his intention that the vessel should proceed and enter the harbour under her own sail. He did entertain that intention, and intended to give directions to that effect, because he was negligently ignorant of the state of the tide at the time. He discovered his own ignorance just a moment too late, and then he changed his plan and gave the order, which he should have issued before, to drop anchor; and the consequence of his having been too late is one for which I think the respondents are clearly responsible.

LORD HERSCHELL:—

My Lords, I am of the same opinion. According to the account which the harbour-master himself gives, for whom the defenders are responsible, he was on the occasion in question inviting this vessel to enter the harbour. He was so inviting her under the impression that the tide was a flood tide, or at all events in ignorance that it was an ebb tide; and it appears clear upon all hands, that for a vessel to enter the harbour otherwise than upon a flood tide is a dangerous operation, and one which ought not to be attempted. According, therefore, to the shewing of the harbour-master himself, he was giving an invitation which, under the circumstances, he ought not to have given, because it was one which could not be followed without danger.

Now that is the case put forward by the defenders' own main witness, on whose action everything turned so far as they are

concerned. It seems to me impossible to doubt that the learned judges in the Court below, were right in thinking that there was ample evidence to warrant the conclusion (indeed, that only one conclusion was possible) that there had been negligence on the part of the harbour-master, and that for that negligence the defenders were responsible. This was the conclusion of the Lord Ordinary at the close of his judgment in favour of the appellant. But the learned judges in the Inner House came to the conclusion, that although that negligence was established the defenders must be assoilzied because there was contributory negligence on the part of the appellant, without which this accident would not have happened. Now, that contributory negligence is alleged to have been the contributory negligence of those in charge of the ship. I think that expression is an unfortunate one, because it seems to me that when negligence is sought to be imputed to the owner of the vessel, it is necessary to inquire who is the particular person for whose negligence you seek to make him responsible. To speak in this way, "of those in charge of the ship," is calculated to lead to misunderstanding, and I think to mistake.

At the critical time, according to the view which I take, the person in charge of the ship was the master of the ship. These fishermen (local pilots, if you will) who had been taken on board by him for his assistance and guidance, were not at that time in fact in charge of the ship. The evidence is this, that when a vessel comes to a certain point she must from that point obey the instructions of the harbour-master. The master was himself at the helm, and so far from these men assuming any command or control of the vessel, they were looking for instructions, as is clear from the request which they made to the harbour-master to direct them what to do. Therefore, if they had ever had charge of the ship they had abandoned it; and there was no obligation that they should have charge of her. The master himself was steering the ship, and was looking to the harbour-master for directions. I am, therefore, quite unable to take the view that these two men were in any sense in charge of the ship—the master was in charge of her. It may still be that if there had been any failure to give information which the captain

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ought to have received from them, they might have been to blame, and a question would then have arisen, whether that blame could under the circumstances be imputed to the master of the vessel. But it is unnecessary to give any opinion upon that point.

Now, who was guilty of the contributory negligence which is alleged? Was it the master? The master of the vessel no doubt was the person who ported the helm, which is said to have been a wrong manœuvre. But it appears to me obvious that the master of the vessel was led to port the helm by the act of the harbour-master; and if the tide had been a flood tide, as the harbour-master supposed that it was, my impression is that the accident would not have happened, and that the vessel would have passed this bank with safety. The witnesses all say that the set of the ebb tide was towards the bank, and that the set of the flood tide was from the bank, and that in flood tide there would have been no danger in the manœuvre. The porting of the helm, though no doubt erroneous in an ebb tide, was erroneous only to a person who knew the condition of the river. There was nothing in the state of the river, as far as it could be seen, to indicate to a person not acquainted with it any danger in coming on in the course which the *Janets and Ann* was taking. The master was ignorant of the state of the river—he had only been there once before, I think nine years before. How is it possible to say that the master was guilty of any negligence, with a direction from the harbour-master to come on, whatever the gesture connected with it may have been, and to come on as the master of the vessel says (and there is no contradiction of it so far as I can see) in a course which was appropriate for entering the harbour, according to ordinary navigation, but for the existence of a bank of which he was ignorant? How it can be said that under such circumstances he was guilty of any negligence at all, I am entirely at a loss to see.

But then it is said that there was negligence on the part of the two pilots, and that their negligence may be imputed either to the master or to the owner of the vessel, I do not quite know in which way the case is put. I think that there

is very great difficulty in imputing the negligence of these fishermen either to the master or to the owner of the vessel. But was there any negligence on their part at all? They, it is quite true, knew of the bank; but because they knew of the bank they very naturally interpreted the manœuvre suggested by the harbour-master in a different way from that in which it was interpreted by the captain. He not knowing of the danger, understood that he was to make the best of his course into the dock. It was natural enough that they, knowing of the danger which there would be if the vessel came too near in towards the pier, should understand that she was merely being brought near the pier for the purpose of anchoring in order to be warped in. Therefore they called out to the harbour-master, "Let us know when we are to let go our anchor," imagining that he would give that order so as to save her from going on the bank; and if he had given that order in time no accident would have happened. Was there any negligence on their part in doing so? It is quite true that he let them go on too long. It is quite true that they were apprehensive that if he let them go on too long danger would ensue. But when did the time come at which these men ought to have disregarded the orders of the harbour-master, and to have taken upon themselves to anchor, instead of obeying his orders? It is obvious that by disregarding his order danger might have followed. If it had followed, that would have thrown the entire responsibility upon them. I fully agree with my noble and learned friend, the Lord Chancellor, in his statement that when a vessel is within the jurisdiction of the harbour-master, and he is giving his orders as to the place of anchorage, it is only in the last resort and when the danger is fully obvious that any rational man would think that the harbour-master's orders should not be strictly attended to. I very much doubt whether the negligence of these men could, under the circumstances, be treated as negligence of the person in charge of the ship for which the owner was responsible; but, even assuming that it could, I cannot see that there was any negligence at all.

I should add this further, that the harbour-master saw the vessel coming under a port helm, which is said to have been

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a wrong manœuvre, and seeing her coming under a port helm, he called out again, "Come on." That was not done in a way which would unmistakably and unequivocally indicate to her that she was in the direction of danger, and must change her course, and carry out an entirely different manœuvre.

Under these circumstances I think that the defenders are responsible for the negligence of the harbour-master, and that there was no contributory negligence negativing that responsibility.

LORD MORRIS:—

My Lords, in the view which I take of this case, I consider that the pursuer is affected by the knowledge of Smith and Poland, the pilots, and that if contributory negligence could be brought home to Smith and Poland, it would affect the pursuer. The captain took those two men on board as pilots. I see that at the trial it seems to have been the object of the defenders to disparage Smith. It was suggested that he was rather a poacher than a pilot. Now, it would appear that it was rather the object of those on the part of the pursuer, to shew that Smith was only a fisherman. He was accepted by the captain as a pilot. The captain in his evidence says, that because of this he took these men on board. He took their directions right through. He allowed Smith to hail the harbour-master while he was standing on the dock. The answer of the harbour-master was to the hailing of Smith, who was the pilot, at all events, on that particular occasion. He was accepted by the captain, and an observation was made by the harbour-master by which he was really as much affected as the captain himself. I am therefore clearly of opinion, that the captain must be affected by the knowledge of Smith and Poland, and, if so, the pilot was in the place of the owner of the ship on that occasion; and if contributory negligence is brought home to Smith and Poland, I think that the case ought to be decided in favour of the defenders.

But on the assumption that that is so, I am still of opinion that the judgment which has been moved is the proper one. What, exactly, did the harbour-master say? "Come on," was

admittedly his phrase. I leave out of consideration his gesture or the waive of his hand; but at the time when he was asked, "When are we to anchor?" he said, "Come on." Ordinarily speaking to one who is not a nautical person, that means "come on," in the direction of the person who is making the observation —that is to say, "Come on" in the course that you are going. The harbour-master saying that, whoever is in charge of the vessel is under the impression that "Come on," means that he is to port his helm and come in the direction of the speaker —that is a distance of 150 yards. The case now of the harbour-master is, that by "Come on" he intended that the vessel should sail right through into port. In answer to the question: "When shall we anchor?" which appears to be a very natural question, the harbour-master says, "Come on." Anchoring is not a mode of progression. Even taking the most favourable view of it, it appears to me, looking at the captain's story, that he was never under the impression at that time, when this observation was addressed to him in answer to the question, "When are we to anchor?" that the vessel was to sail right through into port. Those words would bear, to him, a totally different character. The question being, "When are we to anchor?" the reply would not convey to him the idea that "Come on" meant "Come right on into port." I am under the impression that the harbour-master, it being a flood tide, thought that the vessel could advance with safety under a port helm. They did not see the danger until one of the pilots, Smith, again, hailed the harbour-master, and said, "Be sure to tell us when we are to anchor." Smith said that seeing the approaching danger; but neither Smith nor the harbour-master, who had as much knowledge of the bank as these two pilots had, could have come to the conclusion that they were tilting up against the bank, or why should they have pursued a course which led them towards the bank? Both Smith and the harbour-master, in my opinion, thought the vessel was approaching the bank. Smith seems to have been more wary than the harbour-master, and to have seen that the vessel was getting into danger. The harbour-master, as it appears to me, did not at first think so; but at last, he said: "Now let go the anchor." That would not have been

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the observation of a man who intended the vessel to sail right through and not to port her helm. In addition to that, it seems to me, that seeing the vessel going along that river about 150 yards (because the accident took place at about 50 yards, and it would occupy three or four minutes), if the harbour-master had seen that to be the wrong course he would have remonstrated, instead of which, he encourages those on board to keep their course.

In my opinion, my Lords, there is no contributory negligence established against Smith. He hailed the harbour-master twice at least, and put the question to him, which I have stated; and he acted under the impression that, although he might have apprehended danger, that danger was not of a manifest and plain character, and he thought that he might stop in time to avoid actual danger; he taking the course which was prescribed to him.

LORD FIELD:—

My Lords, I am also of opinion that this appeal should be allowed. The question is one of fact. Now, the Lord Ordinary and the learned Lords of Session have all been of opinion that the act of porting the helm, when and where the helm was ported, was directly due to the act of the harbour-master, and I see no reason whatever to differ from that conclusion. The only point which seemed to me capable of being argued at your Lordships' Bar, with any prospect of success, was whether or not the master, and those on board the ship, were guilty themselves of such negligence, directly conducing to the accident, as to absolve the defenders from blame.

Now, I have followed with great care the observations which have been made by both of my noble and learned friends who have preceded me, and I cannot help concurring in the view which has been expressed by my noble and learned friend opposite (Lord Herschell) upon the question, whose negligence it is that is alleged to be contributory, so as to afford protection to the defenders. It must be the negligence either of the master or of the two so-called pilots who were on board. I agree in thinking that the ship at the time when she ported her helm was in

charge of the master. It is true that he had the two men on board, who were acquainted with the river; but it seems to me that he is the person upon whom the negligence ought to be fixed, if it can be fixed at all. Now, was he justified in doing what he did? He himself was a stranger to the river. The harbour-master was the person whose orders, in my judgment, he was bound to obey. The bye-law is very express: it points out that as soon as a ship arrives at the Moat Brae she is not to proceed, if the harbour-master's orders are that she is not to do so.

Now, was the master guilty of any negligence? or did he act reasonably in what he was then doing? Now it is difficult, of course, with a considerable conflict of evidence as to what did take place, to decide upon what is the exact truth; but there is evidence that the harbour-master said, "Come on." It is also said that he waved his hand, and that the master of the ship was himself ignorant of the state of the water, or of the condition of the river. It seems to me, therefore, that the harbour-master, certainly acted in such a way as that the master and everybody concerned thought that he was inviting the ship to come on, both by his language and by his gesture; and that under these circumstances it is impossible to impute to the master of the ship such negligence as to destroy the pursuer's right to sue.

Then with regard to the two persons who are called pilots, they certainly did know of the danger which the ship was running; but looking to the terms of the bye-law, and also to the power of the harbour-master and the ordinary course of practice in the river, it seems to me that they might not unreasonably act upon the view that the harbour-master was going to stop them, and to answer their inquiry, made twice, "Where shall we anchor?" and "Let us know when we are to anchor," in time to prevent any injury. Therefore, I think that they did not act unreasonably in proceeding as far as they did.

Interlocutors of the 19*th December*, 1890, *and* 26*th February*, 1891, *appealed from reversed: Interlocutor of the Lord Ordinary of the* 11*th of June*, 1890, *restored: Cause remitted to the*

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Court of Session: The respondents to pay to the appellant the costs of the action in the Court of Session, and the costs incurred by him in respect of the appeal to this House.

Lords' Journals, 31st March, 1892.

Agents for appellant: *Pritchard & Sons, for Moss & Sharpe, Chester.*

Agents for respondents: *Stibbard, Gibson, & Wills, for John Bell, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
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BANK OF AFRICA, LIMITED. . . . . PLAINTIFF;

AND

SALISBURY GOLD MINING COMPANY, LIMITED . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Lien by Company on Members' Shares—Articles of Association—Lien Lost or Waived.

A lien conferred upon a company by its articles of association on all shares registered in the name of a member for his debts to the company, such member's title to transfer the same, while he remains indebted, being thereby made dependent on the approval of the directors, is valid.

Bradford Banking Company v. *Briggs & Co.* (12 App. Cas. 29) approved.

Such lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention or which shew an intention to waive it.

Where an indebted shareholder applied to the company for time, and the indulgence was granted in consideration of his authorizing certain shares, other than those on which a lien is claimed in this suit, to be sold on default without the delay prescribed by the articles:—

Held, that no limitation of the lien on the shares in suit was contemplated by either party, and that a transfer by the indebted shareholder of such shares should not be registered.

APPEAL from an order of the Supreme Court (Jan. 31, 1890), absolving the respondent company from a claim to have 400 of its shares, then registered in the name of Woolridge, transferred to Barron Smith, as the nominee of the appellant company, and the certificates thereof delivered to the said company.

The facts are stated in the judgment of their Lordships.

Phipson Beale, Q.C., and *Methold*, for the appellant, contended that he was the bonâ fide holder for value of 400 shares in the respondent company without notice of any lien as alleged by the respondent. Registration of these shares ought to have been effected as claimed. Further, the respondent had waived the

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lien claimed in this action. It had accepted a promissory note and a transfer of 1000 other shares as security for its debt and in full discharge of its alleged lien on the shares in suit. The respondent was estopped by laches and acquiescence from setting up any lien against the appellant, whose claim to the said shares it had by its conduct in effect acknowledged. Reference was made to *Cowell* v. *Simpson* (1); *Mason* v. *Morley* (2); *Brettle* v. *Burdett* (3); *Hooper* v. *Gumm* (4); *Angus* v. *McLachlan* (5); *In re Taylor and Others* (6).

Buckley, Q.C., and *Cave*, for the respondent, contended that when registration of the transfer of these shares was claimed the then registered holder, Woolridge, was indebted to the respondent, which had under its articles of association a lien thereon for the amount of such debt. Until that debt was satisfied the right of lien as claimed and the right of refusal to transfer as made were given to the respondent by those articles. Reference was made to arts. 13–17, 21, 38, 45, 46, 48, 52; see *Briggs* v. *Bradford Banking Company* (7). There had been no discharge of such debt, and no waiver of such lien effected either by the agreement of the 6th of May, 1889, or otherwise. On the contrary, the evidence shewed an intention to maintain such lien until the debt was actually discharged.

Beale, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

The object of this action is to compel the respondent company to register a transfer by one Tristram Woolridge to the appellant bank of 400 of its paid-up shares. The company declines to do so until a debt due by Woolridge, the registered owner of the shares, has been satisfied.

By sect. 38 of its articles of association, the company has a first and paramount lien upon all the shares registered in the

(1) 16 Ves. 279.
(2) 34 Beav. 471; 34 L. J. Ch. 422.
(3) 2 De G. J. & S. 244.
(4) Law Rep. 2 Ch. 282, 291.
(5) 23 Ch. D. 330.
(6) [1891] 1 Ch. 590.
(7) 12 App. Cas. 29.

name of each member for his debts to the company; and sect. 52 provides that no shareholder shall be entitled to transfer his shares, without the approval of the directors, "so long as his shares are not fully paid up, or afterwards, if he either alone or jointly with any person or persons is indebted to the company on any account whatever." The validity of a lien conferred in these or similar terms by articles of association was fully recognised by the House of Lords in *Bradford Banking Company* v. *Briggs & Co.* (1).

The appellants do not dispute that, in the absence of any waiver of its lien, the company would be justified in refusing to register their transfer. But they maintain that certain transactions which took place between Woolridge and the company, as well as between the company and themselves, necessarily imply a surrender of the company's right to treat the 400 shares in question as a security for the debt due by Woolridge.

It appears that the company, in December, 1888, resolved to increase its capital by the creation of 3000 new shares of £1 each, of which 750 were kept in reserve and the remainder offered to the public. George Brown, a broker in Pietermaritzburg, acting under a power of attorney from Woolridge, tendered for the whole 2250 shares, £1 subscription with a premium of £35 16*s.* for each of them, payable one fourth immediately, another fourth upon allotment, and the balance upon the 28th of February, 1889. The tender was accepted, and Woolridge duly paid the first two instalments, amounting to £41,400. Before the balance became due, he paid the amount stipulated for 1250 shares, and obtained certificates for them as fully paid up.

When the 28th of February arrived, Woolridge did not find it convenient to pay the balance then due in respect of the remaining 1000 shares, which amounted to £18,400. On that day, the company, at his request, agreed to take his promissory note for the balance, payable on the 15th of May, 1889, in consideration of his consenting that, in the event of the note being dishonoured at maturity, the company should have full power to dispose of the 1000 shares, which were either to be retained in the meantime or transferred to a trustee for the company.

(1) 12 App. Cas. 29.

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Under a written agreement between him and the appellant bank, made in March, 1888, Woolridge was allowed to draw against a mass of securities deposited with the bank, which he was permitted to reclaim from time to time, on substituting other securities for those withdrawn; his obligation being to keep the amount of the bank's advances to him fully covered. In March, 1889, he deposited with the bank, in pursuance of that obligation, certificates representing the 400 shares now in dispute.

Before his promissory note matured, Woolridge applied to the company for a further extension of the term of payment. To that request the company acceded, upon terms which were embodied in an agreement dated the 6th and 10th of May, 1889. In accordance with these, Woolridge gave a new promissory note for the amount of his debt, to be renewed from time to time if both parties consented. He also agreed to transfer the 1000 unpaid shares to the company's solicitor, in trust for the purposes of the agreement and in security of the debt; and he authorized the trustee, in case of his default, to realize the shares at once and to pay the proceeds to the company, "in satisfaction or on account of the said liability."

It was argued by the appellants that the company, in February, and again in May, 1889, transacted with Woolridge upon the footing that his debt, as then constituted by a promissory note, was to be specially charged upon the 1000 shares, and must therefore be held to have passed from any lien previously affecting the 1250 shares for which certificates had been issued.

Their Lordships do not doubt that a right of lien may be discharged by a new arrangement between creditor and debtor the terms of which are incompatible with its retention, or by any other arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. An agreement giving the creditor new and special powers with respect to part of the subjects covered by his original lien may be conceived in such terms as to imply that he is not to have recourse against the remaining subjects. But the mere fact of the debtor agreeing to give his creditor authority to sell part of

the subjects without notice, upon his making default, is not, in the opinion of their Lordships, sufficient to warrant the inference that the creditor is not to realize the other subjects of his security if necessary. It indicates the intention of the parties that the burden of the debt shall be cast, in priority, upon the subjects to which the authority relates; but it does not necessarily imply that the security of the creditor is to be restricted to these subjects.

Their Lordships are unable to find in the agreements of February and May, 1889, any stipulation or expression calculated to suggest that a limitation of the lien given to the company by its articles of association was in the contemplation of either party. On both occasions Woolridge asked for time and nothing else, and the indulgence was granted in consideration of his authorizing the 1000 shares to be sold if and when default was made, without the necessity of waiting for fourteen days after written notice to him, as prescribed by sect. 39 of the articles of association.

Upon the 22nd of June, 1889, the appellants, by a letter addressed to the secretary of the company, intimated that they had a lien over 400 shares registered in the name of Woolridge, and requested that any dividend arising upon these shares should be paid to them. Until receipt of that communication the company had no notice of the bank's title to these shares, and had no reason to suppose that any one was asserting an interest preferable to its own lien. On the same day the secretary sent a reply, declining to recognise any other person than the registered owner as having right to dividends, and suggesting that the appellants should obtain an order from Woolridge for payment of dividends to them. No reference was made in that letter to the company's lien; but, on the 11th of July, 1889, the secretary, having meanwhile brought the matter before his directors, wrote by their instructions to the appellants, stating "that, acting under and by virtue of the provisions of clauses 38 and 52 of our articles of association, they cannot in any way recognise the lien held by your bank over shares in Mr. Woolridge's name." At the time when this correspondence passed, Woolridge had not executed a transfer of the shares to

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the appellants, and, in point of fact, he did not do so until the 30th of August, 1889.

If the appellants, during the interval of time between their receipt of the secretary's letters of the 22nd of June and the 11th of July, had made fresh advances to Woolridge, in the belief that the company did not mean to claim any right to the shares, the question would have arisen whether the company could assert its lien, so as to defeat the security of the appellants for these advances. But the relative position of the appellants and their debtor Woolridge remained unaltered during that period. It was also suggested that the company had lost its lien by giving effect to transfers by Woolridge of other parcels of his 1250 paid-up shares, and thereby charging an undue proportion of Woolridge's debt upon the shares deposited by him with the appellants. It is sufficient answer to say that the suggestion is without foundation in fact, because the evidence shews that after the 22nd of June, 1889, although various transfers by Woolridge were presented for registration, the transference was in every case suspended, possibly in order to await the result of this controversy.

In these circumstances their Lordships are of opinion that the judgment of the Court below is right, and they will therefore humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs incurred here by the respondents.

Solicitors for appellants: *Budd, Johnsons, & Jecks.*
Solicitor for respondents: *W. F. Tarn.*

[PRIVY COUNCIL.]

NATIONAL BANK OF AUSTRALASIA . DEFENDANT; J. C.*
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AND
MORRIS . . . . . PLAINTIFF. Jan. 29.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—25 Vict. No. 8—Payment of Debt—Creditor's Knowledge of his Debtor's Insolvency.

Where a creditor receiving payment had knowledge of circumstances from which ordinary men of business would have concluded that his debtor was unable to meet his liabilities :—

Held, in an action by the debtor's assignee in insolvency to recover such payment, that the same was invalid, the creditor having known at the date thereof, within the meaning of 25 Vict. No. 8, of his debtor's insolvency.

APPEAL from an order of the Supreme Court (February 21, 1890), discharging a rule nisi to shew cause why a verdict entered for the respondent for £2062 should not be set aside, and a verdict entered for the appellant, or nonsuit, or new trial.

The question arose upon the construction of the local Acts 5 Vict. No. 17 and 25 Vict. No. 8 ; sects. 8 and 9 of the former Act and sects. 1 and 2 of the latter being particularly referred to.

The facts appear in the judgment of their Lordships.

Sir *H. Davey*, Q.C., and *Danckwerts*, for the appellant, contended that the transactions in question were payments really and bonâ fide made by Braun to the appellant before any order was made for the sequestration of Braun's estate. Consequently it was before any such order was or could have been known to the appellants or Braun, and such payments accordingly were valid. The appellant was a bonâ fide holder for value of the cheques in question without notice of any defect in Braun's title. 5 Vict. No. 17, and 25 Vict. No. 8, do not avoid the negotiation

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of negotiable instruments to such a holder. There was no evidence bringing the case within sect. 2 of the later Act, and the appellant had neither the knowledge nor the notice mentioned therein. Nor were the payments fraudulent or void within the meaning of the earlier Act. On the contrary, they were within and protected by sect. 1 of the later Act. Reference was made to *Currie* v. *Misa* (1); *M'Lean* v. *Clydesdale Banking Company* (2).

Finlay, Q.C., and *Pollard*, for the respondent, contended that Braun at the dates upon which the payments were made by him to the appellant was shewn by the evidence to have been insolvent. Or the evidence shewed that he was by such payments rendered insolvent, or that he thus contemplated the surrender of his estate as insolvent. The payment was made under such circumstances as to constitute a voluntary preference of the bank to other creditors, and was, therefore, absolutely void under sects. 1 and 2 of 25 Vict. No. 8. No ground has been shewn for disturbing the finding as to facts of the jury approved by the Court below. The burden was on the bank to prove that it had no notice of any act of bankruptcy: see *Ex parte Schultz* (3). As to what is sufficient notice, see *Willis* v. *Bank of England* (4). The bank has not lost its remedy against Davies, the surety: *Petty* v. *Cooke* (5).

Danckwerts, replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The respondent is the plaintiff in the suit which has led to this appeal, and the appellants are defendants. The question is whether the plaintiff can, as assignee in insolvency of Benjamin Braun, recover from the defendants the sum of £2062 17*s.* 6*d.*, being the amount of two cheques paid to the defendants by Braun prior to the sequestration of his estate.

On the 17th of April, 1886, Braun opened an overdraft account

(1) Law Rep. 10 Ex. 153; 1 App. Cas. 554.
(2) 9 App. Cas. 95.
(3) Law Rep. 9 Ch. 409.
(4) 4 Ad. & Ell. 21.
(5) Law Rep. 6 Q. B. 790.

with the Sydney branch of the bank, whose head office is in Melbourne. His overdrafts were secured to the extent of £2000 by the guarantee of a gentleman named Davies, of whose solvency the bank was confident. The cheques now in question were paid in by Braun on the 27th and 29th of June, 1887; a time when, as was admitted at the trial, Braun was insolvent. On the 8th of September, 1887, his insolvency was declared and the order for sequestration made.

It cannot be contended that under the Insolvency Act, 5 Vict. No. 17, sects. 8 or 12, the payments in question were valid against Braun's assignee. Indeed, it seems to have been found that payments to creditors were not sufficiently protected under that statute; for further provision for the purpose was made by the statute 25 Vict. No. 8. It is thereby enacted that every payment made by any person before the sequestration of his estate to any creditor on account of any just debt due at the time of payment shall, except in the cases after mentioned, be deemed a valid payment. And then follows a proviso that such creditor shall not at the time of payment have known that the debtor was then insolvent.

There is no doubt that Braun's payment was on account of a debt justly due from him to the bank. The sole question, therefore, is whether the bank knew before the 27th of June that Braun was insolvent.

The case was tried before Mr. Justice Windeyer and a jury, but the jury have only given a formal verdict. After the evidence had been taken the parties came to the following arrangement:—

"By consent it is agreed that a verdict be entered for plaintiff, for £2062 17*s.* 6*d.*, with leave by consent reserved to the defendants to move the Full Court to set aside such verdict and to enter it for the defendants, on the facts or on the law, and the Court to draw inferences of fact, and to give its decision on the facts as a jury might."

The defendants then moved the Court to set aside the verdict, and to enter either a verdict for themselves, or a nonsuit, or to grant a new trial, and they obtained a rule nisi for that purpose. On argument the Court discharged the rule, so that the verdict

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stands. The defendants appeal from that judgment. This board has, therefore, to decide the question of fact whether or no the bank knew before the 27th of June, 1887, that Braun was insolvent.

Their Lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent. In this case it is shewn by the evidence of Mr. Balfour, the manager of the Sydney branch, and by the documents produced by him, that Braun's account was always overdrawn; that before the 27th of June, 1887, the bank had refused on various grounds to honour cheques and notes presented on Braun's behalf, to the number of thirty-four; and that especially five of Braun's promissory notes, for sums amounting to above £550, were dishonoured on the 15th, the 22nd, and the 25th of June, all on the ground that, if paid, his overdrafts would have exceeded the amount covered by Davies's guarantee.

It further appears, not only that there was cause to believe Braun to be insolvent, but that the bank were seriously uneasy about his debt to them. As early as the 8th of March, 1887, the head office at Melbourne wrote to the Sydney branch advising that the account should be gradually reduced. On the 10th of March Balfour wrote to Braun requiring him to pay off his debt by instalments, to be completed by the 30th of September; and on the 28th of May Balfour wrote a more peremptory letter, requiring immediate payment.

Moreover, on the 22nd of June, Davies called at the head office to ask that pressure should be brought to bear on Braun. He was informed by the manager that the bank was doing this, and would persevere. On which he expressed a hope that the bank would exhaust Braun before coming on him. On this point it is argued by the defendants, that Balfour, who received Braun's money at Sydney, on the 27th of June, did not know what passed at Melbourne on the 22nd of June. But, whatever may have been the state of Balfour's knowledge, it is the bank who are sued, and they cannot get rid of knowledge which is

brought home to them at Melbourne by alleging the ignorance of their agent at Sydney.

What have the defendants to set against this strong evidence that the insolvency of Braun was apparent to them? First, that Balfour states that he did not believe or suspect that Braun was insolvent. We need not inquire nicely whether Balfour used the term "insolvent," as is suggested by a subsequent passage in his evidence, in a sense compatible with Braun's inability to meet his engagements. It is sufficient that he knew the facts which ought to have shewn him clearly enough that Braun could not do so. Secondly, it is pointed out that on the 17th of August Davies paid off the balance of the account, £170 16*s.* 4*d.*, and that Balfour then cancelled his guarantee, which, it is insisted, shews strongly that Balfour must have thought Braun to be solvent on the 27th of June. Now, with questions between Davies and the bank, their Lordships have nothing to do in this suit. It may be that Balfour thought that the bank was safe, and that he might prudently release Davies. It may be that he erred in judgment as to Braun's position, or that he erred in law as to the right of the bank to retain Braun's money. None of these suppositions go to displace the effect of the evidence, shewing that before the 27th of June, the bank, through their agent Balfour, and from information at the head office, knew matters shewing clearly enough that Braun was an insolvent man.

The result is, that their Lordships concur with the Supreme Court, and that the appeal must be dismissed with costs. They will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Markby, Stewart & Co.*
Solicitors for respondent: *Hemsley & Hemsley.*

[PRIVY COUNCIL.]

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LONDON CHARTERED BANK OF AUSTRALIA . . . . . } PLAINTIFF;

AND

McMILLAN . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Banker and Customer—Fraudulent Detention of Money by Customer's Cashier —Unauthorized Overdraft—Liability of Bank.

Where in pursuance of an arrangement between the appellant bank and the local government the Registrar-General opened an account which, to the knowledge of the appellant, was simply for the purpose of the daily lodgment of the collections of his department and the weekly transferring by his cheque of such lodgments to the treasury; and the cashier sent to lodge such moneys continuously kept back a part thereof, concealing his fraud by means of forged receipts by a fictitious clerk of the bank, whereby the weekly cheques of the Registrar-General in favour of the treasury resulted in overdrafts to the extent of £6127, of which he was ignorant, and which the bank omitted to bring to his notice:—

Held, in an action by the bank against the Government to recover the same, that the latter was not liable. The Government had only received the amount which had been actually collected and which the bank by honouring the weekly cheques represented that it had received in lodgment. The overdrafts by the Registrar-General were not merely without authority, but were outside the scope and object of the lodgments and of the drawing therefrom.

APPEAL from an order of the Supreme Court (Sept. 8, 1890), to the effect that a verdict found for the appellant should be set aside and entered for the respondent.

The facts are stated in the judgments of their Lordships.

Sir *H. Davey*, Q.C., and *Pollard*, for the appellant, contended that the respondent was liable for the overdraft by Ward. The respondent did not deny that the amount sued for had been obtained by the Government from the bank by means of Ward's cheque. But he contended that as Ward was personally respon-

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, and SIR RICHARD COUCH.

sible for the amount, the handing over by him of his cheque was under the regulation of the service a discharge of a personal debt; and that there was no privity between the Government and the bank in respect thereof. But that contention disregarded the nature of the account and of the cheque. It was drawn by one officer of Government on account of the public service, presented by another officer of Government, and paid out of a "public revenue account" kept by the authority of the Government. Under the arrangement between the Government and the bank, it was the duty of the bank to honour cheques drawn by the authorized officer. And under the circumstances the honouring of the cheque was an advance to the Government both in law and fact. Ward was authorized to draw cheques on the account in question on behalf of the Government, and the bank was authorized to honour them. If Ward had no authority to overdraw, the payment in question was made without consideration and under a mistake of fact. The moneys received by the Government were, under the circumstances, had and received by them to the use of the appellants. Reference was made to *Chambers* v. *Miller* (1), the authority upon which the Court below had proceeded.

Rigby, Q.C., *Gorell Barnes*, Q.C., and *Walton*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MORRIS:—

The appellants seek to reverse the judgment of the Supreme Court of New South Wales, dated the 8th of September, 1890, by which a verdict had for the appellants, for £6127 6*s.* 2*d.*, against the respondent was set aside, and the verdict entered for the respondent. The respondent, as Colonial Treasurer, represented the Government of New South Wales. It appears that on the 5th of January, 1885, an agreement was come to between an association of banks, of which the appellant bank was one, and the Government of New South Wales, in which are stated

(1) 13 C. B. (N.S.) 125.

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the Terms and Conditions on which the several Associated Banking Companies agreed to conduct the Government business. Amongst other duties of the Banks set forth in the agreement was the following, which is contained in the Term No. 3, of the Terms and Conditions, under the heading "Duties of the Banks":—

"To pay all cheques drawn on account of the public service, whether these be by the Paymaster of the Treasury or any public officer or other person or persons to whose credit funds shall from time to time be placed."

Clause No. 3 of the Conditions of Contract states as follows:—

"'The General Banking Account' shall be held to include the public account, the general loan account, the Mint bullion account, and any other account which it may be found necessary to open during the currency of the contract, but not the departmental accounts."

The agreement further sets forth the rate of interest on balances to credit of "the general banking account," and for overdrafts which the Government might require.

An arrangement was shortly entered into with the Banks for the deposit with them of moneys collected by the several collectors of public money in Sydney. That arrangement is disclosed by the letters which passed between the Honourable G. Eagar, on the part of the Government, and the Banking Association and the Registrar-General. The first letter is dated the 9th of January, 1885, addressed to the chairman of the Associated Banks by Mr. Eagar, and is as follows:—

"Sir,—I do myself the honour, in accordance with the understanding come to at the meeting of Managers of the Associated Banks yesterday, in the Treasury, to hand you a carefully prepared list of all the collectors of public revenue and public moneys in Sydney, shewing the probable amount of their collections during the present year. When the Associated Banks have arranged amongst themselves how they desire these officers to deposit their collections, some of whom pay into the credit of the public account daily, while others place their collections to the credit of a public account in their own names, and transfer to the Treasury weekly, I will thank you to return the list, with

full details of the arrangement decided upon, in order that the various officers therein named may be informed and instructed how to dispose of their collections in future."

To that letter the Chairman of the Associated Banks replied by a letter dated the 12th of January, 1885, which is as follows:—

"I have the honour to acknowledge receipt of your letter, B. 15, of 9th instant, and now beg to return two of the three sheets forwarded by you, in which has been specified, as requested, the manner in which the Associated Banks have arranged to receive the deposits of the collectors of public revenue and public moneys in Sydney. The third sheet will be decided upon at the next meeting of the Associated Banks, and forwarded to you without delay."

Then came a letter of the 19th of January, 1885, from Mr. Eagar to the Registrar-General, Ward, which is as follows:—

"Arrangements having now been completed with the Associated Banks for the division of the accounts of collectors of public revenue in Sydney, I have the honour to request that from and after this day, you will deposit your collections daily in the London Chartered Bank to the credit of a public revenue account in your own name, and that you will pay the amount of such deposits into the Treasury weekly, in accordance with the regulations published in No. 274 of the *Government Gazette* of 28th June, 1883."

The duty of the Registrar-General, who was responsible to the Government for the collection of the fees payable in his office, and their custody, was to pay over the amount daily into the appellant Bank. He did so, by sending each morning to the Bank by his cashier the amount collected the day before, and at the end of each week drew his cheque upon the Bank for the amount. The cheque was in the following form: "Pay Colonial Treasurer, or bearer, the sum of £ , being on account of the public service." The controversy in the case has arisen in this way. For a considerable period, and especially from August, 1888, to July, 1889, the cashier sent by Ward to deposit the daily collections kept back some of the money so given to him to lodge, and concealed his fraud from Ward by forging the

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signature of a fictitious clerk of the Bank as acknowledging the receipt of the full amount of the money he should have lodged. Ward accordingly drew his cheques in favour of the Treasury for the weekly totals which purported to be lodged, and which should have been lodged. The fraudulent appropriation by the cashier amounted in July, 1889, to the sum now sued for, and the question arises what, if any, liability exists on the part of the Government of New South Wales to refund that amount to the Bank.

Their Lordships are of opinion that there is no liability on the part of the respondent for the overdraft of Ward. Neither the Treasurer nor the Government gave Ward any authority, express or implied, to overdraw at all; in fact, the lodgment each day was only for the purpose of accumulating to the end of the week the daily collections lodged. The Bank undertook the departmental business of receiving money and paying *it* out on cheques; the Bank knew that the account opened with them by Ward was simply an account for the purpose of the daily lodgment of the collections of his department, and the transferring by his cheque of such lodgments to the Treasury weekly. Ward's cheque was the mode of transfer to the Treasury account of the money lodged by him. The Government in no way gave authority to Ward, or led the Bank to suppose that Ward had any authority to overdraw by his cheques; and the Bank knew, or should have known, that any overdraft was entirely outside the scope and object of the lodgments, and of the drawing against such lodgments. Yet the Bank allowed an overdraft on the lodgments to grow on steadily for a year, until it reached the large amount sued for, when, for the first time, they gave notice. Why the Bank did not on any overdraft of a substantial amount at once communicate with Ward is very extraordinary. They could not suppose that Ward was paying over to the Government money which he had not received, and that to a large amount. Possibly they overlooked the matter, and did not consider it at all. That can be no reason or ground for fixing a liability on the Government, who have only received the amount which Ward did collect of the public money, which he purported by his cheques to have lodged with the Bank, and

which the Bank, by honouring his cheques, gave the Treasury to understand that they had received in lodgment.

Their Lordships concur in the judgment of the Supreme Court. They will humbly advise Her Majesty to dismiss the appeal, and the appellants must pay the costs.

Solicitors for appellants: *Freshfields & Williams.*
Solicitor for respondent: *G. P. Slade.*

[HOUSE OF LORDS.]

H. L. (E.) 1892 *May* 31.

THE TABERNACLE PERMANENT BUILDING SOCIETY . . . . . } APPELLANTS;

AND

JOHN KNIGHT . . . . . RESPONDENT.

Arbitration—Building Society—Dispute between Society and Member—Reference to Arbitration—Special Case, Power of Court to order Statement of—Time, Computation of—Division of a Day—Building Societies Act 1874 (37 *&* 38 *Vict. c.* 42) *s.* 36—*Arbitration Act* 1889 (52 *&* 53 *Vict. c.* 49) *ss.* 19, 24.

Sect. 19 of the Arbitration Act 1889 which provides that an arbitrator shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, applies to arbitrations under the Building Societies Act 1874.

So *held*, affirming the decision of the Court of Appeal ([1891] 2 Q. B. 63).

In an arbitration under the Building Societies Act 1874 one of the parties to the arbitration obtained at chambers an order nisi calling upon the arbitrators to shew cause why they should not be required to state a case for the opinion of the Court. Later on the same day but without having had notice of the order nisi the arbitrators made and signed their award:—

Held, that the jurisdiction of the Court was not ousted and that the order nisi was rightly made absolute.

APPEAL from an order of the Court of Appeal (1).

A dispute which had arisen between the appellants, a building society, and one of its members named Knight, was in accordance with the rules of the society referred to arbitration under sect. 34 of the Building Societies Act 1874. During the arbitration a request was made to the arbitrators on behalf of Knight to state a special case for the opinion of the Court upon a point of law which had arisen in the course of the proceedings. This the arbitrators refused to do. On the 16th of January 1891 upon an application made on behalf of Knight an order nisi was made at chambers that the arbitrators should state in

(1) [1891] 2 Q. B. 63.

the form of a special case for the opinion of the Court the questions of law arising in the course of the reference, unless cause was shewn to the contrary. It appeared from an affidavit of the arbitrators that on the same day (16th of January) they made and signed their award before either of them had notice of the order nisi. Whether the order nisi was made before the making and signing of the award was not alleged.

The order nisi was afterwards made absolute. Upon appeal the Queen's Bench Division (Wills J. and Vaughan Williams J.) discharged the order upon the ground that sect. 19 of the Arbitration Act 1889 does not apply to arbitrations under the Building Societies Act 1874. This decision was reversed by the Court of Appeal (Lord Esher M.R., Fry and Bowen L.JJ.) (1).

1892. March 24. *Cock* Q.C. (*Macoun* with him) for the appellants:—

The appeal rests on two grounds: first that the Court had no jurisdiction to order the arbitrators to state a case; secondly that even if it had the order was made too late. As to the first, sect. 19 of the Arbitration Act 1889 (52 & 53 Vict. c. 49), which requires arbitrators to state a case if directed by the Court, does not apply to the Building Societies Act 1874. Sect. 24 of the Act of 1889 enacts that the Act shall apply to every arbitration except in so far as the Act of 1889 is inconsistent with the Act regulating the arbitration. Now the Act regulating this arbitration, viz. the Building Societies Act 1874 (37 & 38 Vict. c. 42) by sect. 36 gives the arbitrators an absolute discretion—they "may at the request of either party state a case." Where a power amounting to a discretion is given it is a matter for the determination of the person to whom the power is given and for no one else. A power to compel arbitrators to state a case is inconsistent with an absolute discretion: and this is especially so in the case of an Act like the Building Societies Act of 1874 by which the Legislature intended to provide a cheap, speedy and final method of settling disputes in lieu of ordinary litigation. The construction adopted by the Court of Appeal gives the

(1) [1891] 2 Q. B. 63.

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High Court an appellate jurisdiction from the arbitrators and defeats the object of the Act of 1874. In the earlier Act there is no obligation, in the later there is. The two are therefore inconsistent. It is also worth notice that the Building Societies Act of 1874 applies to England, Scotland, and Ireland, whereas the Arbitration Act of 1889 applies only to England, and it cannot be supposed that the Legislature intended to create differences of procedure in the three kingdoms.

As to the second point, the order of Court was made too late, for the arbitrators had already made and signed the award. They were therefore functi officio and had no longer power to state a case or jurisdiction in the matter: *Mordue* v. *Palmer* (1). If there be any doubt as to which of the two was in fact the earlier in time, it is for the respondent to shew that the order of Court was prior.

Fillan (*A. L. Reed* with him) for the respondent:—

As to the first point, the appellants' contention comes to this, that any addition made by the Act of 1889 to the provisions of previous Acts regulating arbitrations is inconsistent with them. That argument refutes itself: otherwise of what effect would sect. 24 of the Act of 1889 be? If the Act of 1874 had contained any words expressly or impliedly prohibiting the Court from requiring the arbitrators to state a case there would have been an inconsistency, but there are no such words. The respondent's argument is forcibly put by Fry L.J. in the Court of Appeal.

As to the second point, it is to be inferred from the affidavits that the order of Court was in fact made before the award was made and signed, though the arbitrators had no notice of the order till after they had made and signed the award. The onus of proof is on those who seek to oust the jurisdiction of the Court. Moreover the award was not published, and a reference is not at an end till the award is published. Independently of that, the order of Court being a judicial act must be supposed to have been done at the earliest possible moment of the day and therefore was prior to the making of the award. Again, under sect. 19 of

(1) Law Rep. 6 Ch. 22.

the Act the Court may require the arbitrators to state a case even after the award is published. The words of sect. 19 are "at any stage of the proceedings." And by sect. 10 the Court may "in all cases . . . remit the matters referred, or any of them, to the reconsideration of the arbitrators."

Cock Q.C. in reply.

The House took time for consideration.

1892. May 31. LORD HALSBURY L.C.:—

My Lords, the first question in this case is whether 37 & 38 Vict. c. 42 is inconsistent with the provisions of the general Arbitration Act (52 & 53 Vict. c. 49). The policy of sect. 19 of the later Act is very manifest. During the progress of an arbitration it may be seen that the arbitrator has mistaken the law and is about to act upon his error, and the power of putting him right used to consist in the right of either party to revoke the submission to arbitration. That power has been greatly controlled by legislation, and now it may be extremely difficult for a party to make such a case to a Court as will induce them to make an order giving leave to revoke unless a case is stated.

Such a case actually occurred in your Lordships' House, and though leave would have been given by this House to revoke the submission unless the parties had consented to terms (which happily they did) it is obvious that this is a clumsy and incomplete remedy. The Court ought to have in its own hands power to compel in a fit case a reference to a Court of competent jurisdiction so as to prevent a failure of justice. This is a power independent of and altogether different from the right of the parties under sect. 36 of the Act of 1874, which enacts that the determination of the arbitrators or the Court shall be conclusive. It provides also that the arbitrators or registrar, as the case may be, may at the request of either party state a case for the opinion of the Supreme Court of Judicature on any question of law.

The later statute makes the provision which I have first referred to apply to every arbitration under any Act passed before or after the commencement of the Act itself (1889), and only

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excepts from its operation any Act inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognised by that Act.

If the two provisions may stand together I am unable to follow the argument that the one Act is inconsistent with the other, and the whole argument depends upon the word "inconsistent" in the later statute. It is obvious to inquire, Where is the inconsistency if both may stand together and both operate without either interfering with the other?

The policy, object, and application of the two sections are entirely different. I think in the Building Act the object was to enable the arbitrators on the solicitation of the parties to state a question of law which might enable them to decide the case in its final result. I think the object of sect. 19 of the Arbitration Act 1889, though in one sense it may be said to have for its object the same result, was rather to hold a control over the arbitration while it was proceeding by the Courts, and not to allow the parties to be concluded by the award, when, as it is said, parties may be precluded by the arbitrator's bad law once the award is made, although they might have had a right to repudiate the arbitrator if they had done so before the completion of the award.

I am therefore of opinion that the first objection here fails, and that the Acts not being inconsistent with each other may be read together, and that the Court or a judge would have jurisdiction to interfere.

The second objection turns upon a question of fact; and I should agree that if a complete award had been made a statute which gives the power to a Court or judge *at any stage of the proceedings under a reference* would not be applicable where the proceedings had come to an end by a completed award. Now I will assume that in this case the award was very nearly completed, but I am equally satisfied that it was not completed and published as the award, but was in process of being completed. I will assume that the arbitrators had no notice of the rule nisi. But the affidavit which states the fact that they had no notice of the rule nisi is studiously reticent about when in fact what is relied on as the completion of the award was effected; and I

infer as a fact that the rule nisi was obtained, whether the arbitrators had notice of it or not, before the award was signed, even if that would be completion.

I think therefore that this appeal should be dismissed with costs.

LORD WATSON :—

My Lords, sect. 19 of the Arbitration Act 1889 enacts that any arbitrator may at any stage of the proceedings in the reference, and shall, if so directed by the Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. The provisions of the Act are, by sect. 24, made applicable to every arbitration under any previous or subsequent statute, "except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognised by that Act."

The appellants concede that, had it not been for the exception in sect. 24, the provisions of sect. 19 would have applied to arbitrations under the Building Societies Act of 1874. They maintain that these provisions are inapplicable, in respect of their being inconsistent with a proviso in sect. 36, to the effect that the statutory arbitrators "may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law," and that the Court had therefore no jurisdiction to make the order appealed from.

If the provisions of sect. 19 had been inserted verbatim in sect. 36 of the Building Societies Act, they would not have repealed the discretion of the arbiters to state or refuse to state a case on the request of a party to the reference. They would simply have conferred upon the arbitrators the additional privilege to state a case proprio motu, and upon the parties the additional right to obtain an order from the Court. The appellants were accordingly constrained to argue that, whenever the provisions of the Arbitration Act are found to add to the enactments of any other statute regulating arbitrations, they are in the sense of the exception inconsistent with it. To hold that the Legislature intended to attach that meaning to the word "inconsistent" would be to defeat the object of the leading enactment

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in sect. 24. In my opinion the object of the Legislature was to add to the remedies open to the parties under a statutory arbitration; and the sole purpose of the exception was to prevent the application of the powers conferred upon the Court by the Act of 1889 to arbitrations under any statute whose provisions, either expressly or by reasonable implication, excluded the exercise of such powers.

A second point was raised by the appellants, which is not noticed by any of the learned judges of the Appeal Court. Sect. 19 only authorizes the intervention of the Court during the dependence of the reference, and does not warrant an order being made upon an arbitrator to state a case after his award has been duly completed; and it was argued that in this case there was a defect of jurisdiction, inasmuch as the award of the arbitrators had been adjusted and signed by them before an order nisi was obtained.

If there had been any evidence to shew that an award was published on the same day as the order but before the latter was applied for, I should not, as at present advised, have been prepared to hold that this case was governed by the decision of the Court of Exchequer in *Wright* v. *Mills* (1). There the Court had undoubted jurisdiction, and was moreover seized of the case at the time when, fictione juris, its order was held to have been made. Here the Court had no process before it until the initial order was applied for; and it had no jurisdiction to grant the order if, at the time of the application, there was a completed award.

I am satisfied, however, that no foundation has been laid in fact for the argument which was addressed to us, and that circumstance probably accounts for the absence of any comment upon it by the Court of Appeal. There is an affidavit to the effect that the arbitrators' award was drawn up and signed by them before they had notice of the order of Court. That statement, which was the sole basis of the argument, plainly implies that the award was not completed before the order was made; and that fact was sufficient to give the Court jurisdiction. The completion of the award, between the issuing of the order and its

(1) 4 H. & N. 488.

intimation to the arbitrators, cannot deprive the parties of their statutory remedy or oust the jurisdiction of the Court.

I am therefore of opinion that the judgment appealed from ought to be affirmed with costs.

LORD HERSCHELL :—

My Lords, the question involved in this appeal is whether the 19th section of the Arbitration Act 1889 applies to arbitrations under the Building Societies Act 1874. That section provides that "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference." Sect. 24 of the same Act provides as follows: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognised by that Act."

It is said on behalf of the appellants that sect. 19 of the Arbitration Act is inconsistent with the Building Societies Act 1874, and therefore does not apply to arbitrations under it. The material section of the latter Act is the 36th, which provides that "every determination by arbitrators . . . . under this Act of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removeable into any Court of law, or restrained or restrainable by the injunction of any Court of equity; provided always that the arbitrators . . . . may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law."

The argument for the appellants is, that this section vests in the arbitrators the discretion whether a case shall be stated or not, and that the later Act, which empowers the Court to order the arbitrators to state a case, is therefore inconsistent with it. I cannot accede to this view. No doubt the Building Societies Act empowers the arbitrators to state a case, and leaves it to them to determine whether they will exercise this power or not;

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the parties cannot compel them to do so. The Arbitration Act which confers upon the Court the power to order a case to be stated, if it applies, adds, no doubt, to the provisions which are to govern an arbitration under the Building Societies Act; but it is clear that the fact that the provision is an additional one does not of itself shew that there is any inconsistency in the two Acts, for, if so, the 24th section would never have any operation. I think the test is, whether you can read the provisions of the later Act into the earlier without any conflict between the two. This you can clearly do as regards the enactment under consideration. For these reasons I concur in the judgment of the Court below.

A further point was argued at the bar which is not noticed in the judgments delivered in the Court of Appeal. It was said that, even if the Arbitration Act applied, the respondent had come to the Court too late, inasmuch as the arbitrators made their award on the 16th of January 1891, and it was only on that day that the order nisi was made, calling upon the arbitrators to shew cause why they should not be required to state a case for the opinion of the Court. The learned counsel for the appellants contended that it was for the respondent to shew, in order to support the order, that it was obtained before the arbitrators had made their award and were thus functi officio. It is unnecessary to determine whether the rule that a judicial act must be regarded as dating from the first moment of the day on which it is done would apply to such an order as that under consideration, or whether it would be sufficient cause for not making the order absolute if it were shewn that the award, though bearing the same date, was in fact signed before the order nisi was made. I can entertain no doubt that where an order nisi has been obtained by a party who has no notice of an award having been made, it is for those who contest it to shew that the award was executed prior to the order being made. This is not shewn in the present case. The affidavit of the arbitrators states only that their award was made and signed before either of them "had notice of the order nisi."

For these reasons I think the judgment appealed from should be affirmed.

LORD MORRIS :—

My Lords, I concur in the judgment which has been moved.

LORD FIELD :—

My Lords, I am also of opinion that this appeal should be dismissed. There are two questions to be considered. The first one is of general importance, namely, whether or not sect. 19 of the Arbitration Act of 1889, by which the Court can order an arbitrator to state a case raising a question of law, is inconsistent with the arbitration provisions of the Building Societies Act of 1874 (37 & 38 Vict. c. 42). The second question is whether in the present case the order to state a case was made whilst the proceedings under the reference were pending.

My Lords, with regard to the first point, I can see no reason whatever why the enactments should not very properly stand together. The Building Societies Act contemplates no doubt, as the learned judges of the Divisional Court thought, a speedy and comparatively inexpensive remedy. It gives that remedy by arbitration, the judges being selected by the litigating parties themselves. Those arbitrators might be laymen, as in the present case they were, or they might be qualified and trained lawyers. But then the statute only gives the arbitrators power to state a case in their discretion at the request of either party.

Now in the present instance the arbitrators seem to have come to the conclusion—I will not say very rapidly, but very decidedly—that the view which they took was the only possible view that could be taken; and certainly this case as it seems to me is an illustration, and a very convenient one, of the benefit which will arise from construing the two Acts together. Under the Building Societies Act the matter was in the discretion of the arbitrators at the request of either party; but then there came this Act—a general Act—which adds an element to it, enabling either of the parties who wishes to have the point authoritatively determined to apply to a judge to compel the arbitrators whether they will or no to state a case.

It was thought by the learned judges in the Divisional Court that by implication that provision was excluded, because it was

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said that the Building Societies Act being an Act eminently for the discussion of questions without delay and without expense, it was entirely contrary to the sense and principle of that Act to import the power to compel the arbitrators to state a case when that Act itself had laid down the only limits within which a case was to be stated. But it must be recollected that it may be far better, and must be generally far better, in a case where the rights of the parties depend upon a question of pure law, the construction of statutes or authorities, to have a right decision than to have merely an inexpensive one, and when it is seen that the Legislature here has interposed the discretion of the judge before whom the case must come before any case can be stated for decision, it seems to me that there is no sufficient ground in the supposed policy of the Acts in question for excluding the operation of the last Act. The provisions may very well stand together. By the first either party may request; by the second if either party request and the arbitrators refuse to state a case, then upon the party going before a judge and shewing that the case is one involving some question of law (upon which two opinions may possibly exist) the judge has power to compel the arbitrators to state a case.

With regard to the second point, I should not be prepared to carry further the doctrine with respect to part of a day and to hold that it cannot be considered in certain cases. In this case I am clearly of opinion, and the evidence satisfies me, that the order was really and truly made before the award.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 31st May 1892.

Solicitor for appellants: *J. R. Pakeman.*
Solicitors for respondent: *Hatchett-Jones & Co.*

[HOUSE OF LORDS.]

THE GRESHAM LIFE ASSURANCE SOCIETY . . . . . } APPELLANTS;

AND

STYLES (SURVEYOR OF TAXES) . . . . . RESPONDENT.

H. L. (E.)
1892
May 31.

Revenue—Income Tax—Life Assurance—Annuities, Sale of—Profits or Gains, Assessment of—Deductions in respect of Annuities paid—Income Tax Act —5 & 6 Vict. c. 35 *s.* 100 *Sched. D case* 1, *rule* 4; *s.* 102.

A life assurance society as part of its business sold or granted annuities in consideration of a lump sum or premium paid down in the case of an immediate annuity, and of a similar payment or of periodical premiums in the case of a deferred or contingent annuity. In making up the balance sheet shewing the amount of its profits and gains for the purpose of assessment to income tax, under Sched. D, the society deducted from its gross income the sum paid in discharge of its annuity contracts. Upon the assessment for the year 1885-6 (and before the coming into operation of the Customs and Inland Revenue Act 1888 s. 24 sub-s. 3):—

Held, reversing the decisions of the Queen's Bench Division (24 Q. B. D. 500) and of the Court of Appeal (25 Q. B. D. 351), that the society was not liable to be assessed in respect of the amount paid by it for annuities.

Alexandria Water Company v. *Musgrave* (11 Q. B. D. 174) distinguished.

APPEAL from an order of the Court of Appeal (1) upon a case stated by Commissioners of Income Tax under 43 & 44 Vict. c. 19 s. 59 stating in substance the following facts:—

The Gresham Life Assurance Society carries on the business of life insurance consisting (inter alia) of the sale of annuities for life or any less time. The consideration for the granting of an insurance of a lump sum payable on death is either the payment periodically of sums of money or premiums, or in some cases the payment of a lump sum as a single premium paid at the time of effecting the insurance. The consideration for the granting of an immediate annuity is the payment of a lump sum or premium paid down, and the consideration for a deferred or contingent annuity is the payment of periodical premiums or of a lump sum paid down.

(1) 25 Q. B. D. 351.

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The annuity obligations of the society when undertaken are in many instances dischargeable abroad. The returns of the society as regulated by the Life Assurance Companies Act 1870 are based (inter alia) upon actuarial calculations of prospective liabilities under existing contracts.

The return furnished to the Board of Trade dated January 1886 correctly sets forth the income and expenditure of the society for three years ended the 30th of June 1885 and the methods by which the profits or gains of the society are actuarially ascertained.

Of this account "The Valuation Balance-Sheet" shews a surplus profit for three years of £97,553 2*s.* 9*d.* From this has to be deducted the surplus brought forward from the previous triennium, viz., £4496 6*s.* 1*d.*, leaving a balance of £93,056 16*s.* 8*d.* The society have during the triennium paid income tax on £120,722 chiefly by tax being deducted at its source on payment to them of interest and dividends.

The society in arriving at the amount of profits and gains for three years, amounting as above shewn to £93,056 16*s.* 8*d.*, had taken into account (among other items of expenditure) the following items, viz.: The sum paid in discharge of its annuity contracts, viz., £253,252 5*s.* 10*d.*, and the sum of £3247 which had been paid for income tax. These two sums of £253,252 5*s.* 10*d.* and £3247 added to the said sum of £93,056 16*s.* 8*d.* amount together to the sum of £349,556 2*s.* 6*d.* From this amount the Surveyor of Taxes admitted by way of deduction the sum on which income tax had already been paid as aforesaid, viz., £120,722, and claimed that the society was chargeable for the three years with the difference of £228,834 2*s.* 6*d.*

One year's proportion, or one-third part of this sum, amounts to the sum of £76,278 0*s.* 10*d.*, for which amount the society was assessed for the year ending the 5th of April 1886.

The Surveyor of Taxes contended that the exception of the annuities and the income tax paid by the society was by way of deduction from the gross income of the society in arriving at the amount on which income tax should be charged, and that the same was not allowable under 5 & 6 Vict. c. 35 ss. 100 and 159, and 16 & 17 Vict. c. 34 s. 40; and further, that the society was

entitled to deduct and should deduct the amount of the duty on payment of each annuity under 5 & 6 Vict. c. 35 s. 102, and 16 & 17 Vict. c. 34 s. 40.

The society contended that they had treated and were entitled to treat the payment of annuities in the same manner as the payment of sums payable on the death of the assured, and that the same cannot be treated as a deduction from or be brought into account so as to increase profits, or be treated as paid out of profits or gains either within the meaning of Sched. D, 4th rule, 1st case, sect. 100 and sect. 102 of 5 & 6 Vict. c. 35, or as otherwise brought into charge by virtue of such Act, or as sums on which income tax is payable by the society under any of the provisions of the 16 & 17 Vict. c. 34.

The Commissioners confirmed the assessment and stated a case, the question for the opinion of the Court being—

Whether the society is liable to be assessed in respect of the amount paid by them for annuities or any part thereof.

The Queen's Bench Division (Pollock B. and Hawkins J.) being of opinion that the society was liable to be assessed to income tax in respect of the amount paid by them for annuities for the year ending the 5th of April 1886, affirmed the determination of the Commissioners (1). This decision was affirmed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) (2).

March 25, 28, 29. Sir *H. Davey* Q.C. and *Lumley Smith* Q.C. (*W. Fooks* with them) for the appellants :—

The error is in supposing that the annuities are paid out of profits and gains. The society has ascertained its profits exactly as any tradesman does for the purpose of income tax. The rules of the Act of 1842 (5 & 6 Vict. c. 35 s. 100 Sched. D) are directed to ascertaining the taxable income. Rule 4 of the first case (on which reliance is placed by the other side) says that no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of the profits or gains. If these annuities were payable out of the society's profits and gains the decisions below would be right; but they are not: they are paid out of the general fund. The "profits

(1) 24 Q. B. D. 500. (2) 25 Q. B. D. 351.

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and gains" of a life insurance business must be ascertained in the ordinary way and upon the principles applicable to business in general. In a business for the sale of annuities the profits and gains cannot be ascertained till the annuities are paid. It is said contrà that if the annuities were not paid the profits and gains would be larger. But that is not so; unless the annuities were paid there would be no profits or gains, for there would be no business done in annuities. If the construction contrà were to prevail the words "annuity or other annual payment" would include an annual payment of rent for the society's premises, or the salary of clerks &c. The prohibition in rule 4 then cannot touch this case; nor do sects. 102 and 159 give any light. And sect. 40 of 16 & 17 Vict. c. 34 has no bearing. The case comes under the first of the rules applying to both the first and second cases of Sched. D: these annuities are "money wholly and exclusively laid out or expended for the purposes of such trade or concern." The Legislature has itself furnished an argument in favour of the appellants by the Customs and Inland Revenue Act 1888. Sect. 24 sub-sect. 3 of that Act requires the person paying annuities charged with income tax under Sched. D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, to deduct the tax out of such annuities. The present assessment being in respect of the year 1885–1886 is not affected by that Act. The Court of Appeal held that the case was governed by *Alexandria Water Company* v. *Musgrave* (1), which only decided that no deduction could be made in respect of interest on the debenture bonds of the company. This is not disputed; interest on bonds is an "annual payment, payable out of the profits or gains."

Sir *E. Clarke* S.G. and *Danckwerts* (Sir *R. E. Webster* A.G. with them) for the respondent:—

It cannot make any difference to the society which way the appeal is decided. The tax is not a charge on the society; the society is liable to be assessed, but it may collect the amount from the annuitants. Rule 4 of the first case of Sched. D applies to the case. That rule must have intended to tax something

(1) 11 Q. B. D. 174.

which was not otherwise taxed; deductions in respect of capital and interest are dealt with by rule 3, and rule 4 cannot have meant merely to repeat the provisions of rule 3. "Profits and gains" in the Act include everything which is receipt except such deductions as are expressly permitted and named in the Act. These annuities are in truth payable and paid out of profits and gains; they are part of the society's assessable income, just as much as the interest on debenture bonds. The decision in *Alexandria Water Company* v. *Musgrave* (1) was given in 1883; the budgets of Chancellors of the Exchequer are based on the law as declared; communis error facit jus; and law immediately acted on (though only for a few years) should not be disturbed. The appellants' contention is inconsistent with the decision of Pollock B. and Hawkins J. in *Mersey Loan and Discount Company* v. *Wootton* (2) where it was held that a company allowing interest to depositors on the amounts of their deposits was not entitled to deduct the interest in making its return of profits.

[They also referred to sects. 102 and 159; sect. 190, Sched. G, rule 7; sects. 120 and 124 of 5 & 6 Vict. c. 35; 16 & 17 Vict. c. 34 s. 40; *Trustees of Psalms and Hymns* v. *Whitwell* (3); *Last* v. *London Assurance Corporation* (4); *Foley* v. *Fletcher* (5); *Taylor* v. *Evans* (6); and *Goslings* v. *Blake* (7).]

Lumley Smith Q.C. in reply.

The House took time for consideration.

May 31. LORD HALSBURY L.C.:—

My Lords, the commercial concern in respect of which the question arises here consists of a business which is carried on by receiving a sum of money as the purchase-money for the granting of annual sums. The sum so granted is certainly an annuity and an annual payment, and I believe it is the fortuitous use of those words under circumstances that I shall

(1) 11 Q. B. D. 174.
(2) 2 Tax Cases, 316.
(3) 3 Tax Cases, 7.
(4) 10 App. Cas. 438.
(5) 3 H. & N. 769.
(6) 1 H. & N. 101.
(7) 23 Q. B. D. 324.

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presently discuss which has given rise to what seems to me an erroneous construction of the statute.

The question arises under the Income Tax Acts, and the Act itself like all the Acts of the same class purports to be "An Act for granting to Her Majesty duties on profits arising from property, professions, trades, and offices."

Now I leave out for the moment the question of land, and the object being to tax profits certain rules have been inserted in the statute which have become and are made in truth parts of the Act itself. But the rules are, as they themselves import, rules for ascertaining the duties. "The amount of the profits and gains" was the expression all through the earlier legislation on the subject down to the Act of 1805. In that year the expression was altered, as is pointed out by Mr. Dowell in his valuable book on the Income Tax Acts, p. 114, and the observation appears to be well founded, that the alteration of the language pointed rather to a more careful return or statement of income, an account in a debtor and creditor form and intended to prevent deductions, which possibly had been up to that time claimed, being permitted to reduce the amount of the profit which the debtor and creditor account ought to shew. But except as indicating the form rather than the substance of what should be shewn in the return as the balance of profits and gains, I am in the condition of Lord Blackburn, who said, in the case of *Coltness Iron Company* v. *Black* (1) that he had been unable to discover any difference in the meaning of the two phrases.

Now, if I understood the contention before your Lordships aright, it rested on the fourth rule relating to assessment under Schedule D which prohibited any deduction being made on account of any annual interest or any annuity or any other annual payment, and as those sums were annuities or annual payments it was said that they were not to be deducted in estimating the amount of the profits and gains arising as aforesaid. And if the rule had stopped at the point up to which I have quoted it I should have concurred with the contention of the surveyor. But the rule does not stop there. In order to be a

(1) 6 App. Cas. 334.

prohibited reduction it must be sought to be made on an annuity or other annual payment payable "out of such profits or gains."

Now to my mind it is very clear what is the intuitus, both from the enactment and from the rules under which the duties are to be ascertained. The thing to be taxed is the amount of profits and gains. The word "profits" I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits, or the charge which has been made on those profits by previous agreement or otherwise, is perfectly immaterial. The tax is payable upon the profits realized, and the meaning to my mind is rendered plain by the words "payable *out* of profits."

It would be an extraordinary thing to suggest that where a business consists of granting annuities it is to be taxed upon a different principle from any other commercial concern, and no one I suppose could doubt that in any other commercial concern the cost of the thing sold to the trader is one of the expenses incident to the carrying on of the trade.

If an annuity seller is to be treated differently from a seller of any ordinary article of commerce—coals or corn or the like—one would have expected to find some words in the statute rendering him obnoxious to a different system of taxation and enforcing a different mode of ascertaining profits, whereas it seems to me that the application of the general words "profits and gains" or "balance of profits and gains" are equally applicable whatever the commercial concern carried on may be.

I think one gets a very fair notion of what was in the mind of the legislature by a variety of cases put in the course of the argument, which it is not necessary to repeat here.

The Court of Appeal seems to have been impressed by the decision in *Alexandria Water Company* v. *Musgrave* (1). With the decision in that case I am not disposed to disagree, though I am not quite certain I am able to adopt the reasoning which to some extent appears to depend upon a distinction between

(1) 11 Q. B. D. 174.

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the words "gains" and "profits," a distinction which I cannot assent to; but upon the facts I think I should have come to the same conclusion, since, to put it very plainly, in that case it was a claim to deduct the company's debts for borrowed capital and diminish the amount of the profits of the trading.

The whole point seems to me to depend upon the words "*out* of profits and gains." Profits and gains must be ascertained on ordinary principles of commercial trading, and I cannot think that the framers of the Act could be guilty of such confusion of thought as to assume that the cost of the article sold to the trader which he in turn makes his profit by selling was not to be taken into account before you arrived at what was intended to be the taxable profit.

As I have said, the confusion has arisen from the use of the words "annuity or other annual payment," without considering that this particular commercial adventure consists in selling annuities, and that which they pay therefore is to them the cost of the article supplied.

You can no more refuse to take that cost into your consideration when ascertaining the balance of profits and gains than you could the cost of the coals or the corn to the coal merchant and to the corn merchant, in ascertaining what are the profits from his trade.

I am therefore of opinion that the judgment appealed from ought to be reversed.

LORD WATSON:—

My Lords, the business carried on by the appellant society is that of life insurance; and one branch of it consists in the sale of annuities to the public. The consideration for an immediate annuity is a lump sum instantly paid; and, for a deferred or contingent annuity, may either be a lump sum or a series of periodical payments. The question raised for decision in this appeal relates to an assessment under Schedule D in respect of the annual profits and gains arising from the appellants' business for the fiscal year ending the 5th of April, 1886.

In accordance with the provisions of sect. 100, case 1st, rule 1, of the Act of 1842 (5 & 6 Vict. c. 35), the amount upon which

the appellants became liable to pay income-tax for the year in question was one-third of the assessable profits or gains which had accrued to them during the three years immediately preceding the 30th of June, 1885, the date at which their books were last balanced. The appellants had, in the course of these three years, paid upwards of £250,000 in discharge of their contract obligations to their annuitants. The respondent, in estimating the triennial average, included all these payments in the balance of assessable profits or gains, disregarding the contention of the appellants that they ought to be treated as items of debit, for the purpose of ascertaining the balance. On appeal, the Commissioners for General Purposes of the Income Tax Acts for the City of London confirmed the assessment and stated a special case, in terms of 43 & 44 Vict. c. 19, s. 59. The decision of the commissioners has been upheld by a Divisional Bench, as well as by the Court of Appeal.

Rule 1 of sect. 100, case 1st, prescribes that the duty to be charged shall be computed on a sum not less than "the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern." It plainly contemplates the preparation of a balance-sheet in which proper trading disbursements and liabilities are to be set against trade assets, so that the surplus of the latter, if any, will represent the assessable profits or gains of the concern. All the other rules applicable to Schedule D are framed upon the same footing. Rule 3 of case 1st specifies certain items which a trader might, naturally enough, for his own private purposes, insert on the debit side of the sheet; and enacts that these shall not be allowed as deductions, in estimating his profits for the purposes of the income-tax. Rule 4 of case 1st provides, that "in estimating the amount of the profits and gains arising as aforesaid no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains."

The first of the rules applicable to cases 1 and 2 of sect. 100, provides that, in estimating the balance of the profits or gains to be charged according to either case, no sum shall be set against or deducted from such profits or gains for "any disbursements or expenses whatever, not being money wholly and exclusively

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laid out or expended for the purposes of such trade, manufacture, adventure or concern." It seems tolerably clear, and it was hardly disputed by the respondent, that all payments made by the appellants on account of the annuities which they have contracted to pay are, in the strictest sense of the words, disbursements made wholly and exclusively for the purposes of their business. The appellants trade in annuities, and these disbursements are the consideration or part of the consideration which they are bound to give in return for the annuitants' purchase-money already received by them and carried to their credit in the balance-sheet. Unless the statute forbids it, the appellants must have the same right to deduct such payments, in estimating their assessable profits, as a grocer has to deduct the price paid by him for the tea or sugar which he retails. If there be one point free from obscurity in the Act of 1842 it is this, that the Legislature intended all traders, whether in groceries, annuities, or other articles of commerce, to be assessed upon the same footing.

The learned counsel for the respondent were constrained to admit that, were it not for the terms of rule 4 of case 1st, the appellants would be entitled to the deductions which they claim. But they argued that the expression "profits and gains," which occurs twice in that rule, in each instance signifies the gross receipts of the trader, or, in other words, the whole items standing on the credit side of the balance-sheet. Upon that construction of the rule no deduction could be allowed, in estimating profits, of "any annual interest, or any annuity or annual payment;" and one of many startling results would be that the yearly rent and taxes paid by a trader for his business premises, and yearly wages paid to his servants, would not be dealt with as payments out of trading capital, but would be included in the profits upon which he pays income duty.

Although it appears to have been accepted by both Courts below, I cannot assent to the construction put upon rule 4 by the respondent, which is, in my opinion, at variance with its context. The rule begins thus: "In estimating the amount of the profits and gains arising as aforesaid." Does that mean "in estimating the amount of the traders' assets"? I venture to

think not. I think the words refer, not to total assets, but to the balance of profits and gains to be ascertained by virtue of the preceding rules, for the purpose of being charged with income duty. The rule then goes on to prescribe that there shall be no deduction made on account of any annual interest, or any annuity or other annual payment, "payable out of such profits or gains." These last words refer back to profits and gains as described in the commencement of the rule, and must, therefore, be taken to mean, not gross receipts, but profits and gains, the amount of which is to be estimated for the purposes of the Act. Had it been the intention of the Legislature to enact that no annual interest, annuity, or other annual payment should be inserted on the debit side of the balance-sheet, it appears to me that rule 4 would have been expressed in very different terms. The rule, as it stands, merely enacts that no annual payment, which falls to be paid out of profits, shall be deducted from profits, in assessing for income-tax.

The respondent relied in argument upon sect. 102, which directly charges with duty all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain. That enactment is qualified by the proviso that no assessment shall be made upon the person entitled to such payments, in the case where the same shall be "payable out of profits or gains brought into charge by virtue of this Act." In that case the trader must pay upon the whole profits or gains brought into charge, but is authorized to deduct income tax in settling with the person entitled. These provisions do not appear to me to throw any light upon the question, because, in order to ascertain what profits or gains are brought into charge by the Act, it is necessary to go back to the rules of case 1st of sect. 100.

Sect. 40 of the Act of 1853 (16 & 17 Vict. c. 34), which was also referred to in the course of the argument, has really no bearing upon the present question. It empowers persons who are liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, on making such payment, to deduct and retain thereout the amount of the rate of income duty payable at the time; but it has no application

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to annual payments, payable out of profits or gains. Sect. 24 (3) of the Customs and Inland Revenue Act, 1888, for the first time made it compulsory upon the persons liable in payment to retain income-tax, upon their making payment out of the capital which they employ in trade, of any interest of money or annuities charged with the tax under Schedule D, and not payable or wholly payable out of profits brought into charge to such tax. Had that enactment been in force in the year 1885–6, the present controversy would never have arisen.

The only point which remains for consideration is this, whether the annuities paid by the appellants are payable, within the meaning of rule 4, out of profits and gains. In order to bring annuities or other annual payments within the scope of the rule, they must, in my opinion, either be directly charged upon profits, or be in themselves of such a character that they form a proper charge upon profits. Now, I cannot understand in what sense the annuities in question can be said to be properly chargeable to profits. An annuity to the widow of a deceased partner, interest on capital advanced by a partner, or upon money borrowed for the purposes of the business, are truly payable out of profits earned, and therefore ought not to be deducted in estimating the income yielded by the business. On that ground I agree with the decision of the Court of Appeal in *Alexandria Water Company* v. *Musgrave* (1), although I am unable to concur in all the reasons which were assigned for it. But the business of the appellants consists in employing their trading capital to pay annuities, as the counterpart of the consideration given by the annuitant, and the annuities are payable out of stock and not out of business profits.

On these grounds I concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL:—

My Lords, the appellant society, as part of the business which it carries on, sells or grants annuities in consideration of a premium or lump sum paid down in the case of an immediate

(1) 11 Q. B. D. 174.

annuity, and of a similar payment or of periodical premiums in the case of a deferred or contingent annuity. In making up the balance-sheet, shewing the amount of its profits and gains for three years, the society put on the one side of the account the consideration money received for annuities granted; on the other side was put the sum paid in discharge of its annuity contracts. The surveyor of taxes contended that the latter sum ought not to have entered into the account for the purpose of ascertaining the profits and gains on which income-tax was to be assessed under Schedule D of the Income Tax Acts.

This contention was based upon the fourth rule, relating to assessment under Schedule D, which is in the following terms: "In estimating the amount of the profits and gains arising as aforesaid no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains." It was said that this expressly prohibited any deduction in respect of the annuities paid by the society; that the income-tax must be paid upon the basis that the entire sum received by the society as the consideration for its undertaking to pay annuities was to be assessed as profits and gains; and that the society would have a right to deduct income-tax when paying the annuities to those who had purchased them. The contention of the surveyor of taxes has been sustained by the Divisional Court and the Court of Appeal. The learned judges in the Court of Appeal founded their judgment mainly upon a prior decision of that Court in the case of *Alexandria Water Company* v. *Musgrave* (1), which I shall have to consider presently.

It cannot, of course, be denied that, as a matter of business, profits are ascertained by setting against the income earned the cost of earning it; nor that, as a general rule, for the purpose of assessment to the income-tax, profits are to be ascertained in the same way. "Money wholly and exclusively laid out or expended for the purposes of a trade, manufacture, adventure, or concern" may, by the first of the "rules applying to both the preceding cases," be taken into account in estimating the balance of profits or gains to be charged. It seems to me beyond

(1) 11 Q. B. D. 174.

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question that the payments made by the society to its annuitants are within these words. And those carrying on the business of selling annuities would be assessed on quite a different principle to those carrying on other businesses if their gross receipts were to be treated as profits without regard to the payments to which, in consideration of those receipts, they had bound themselves.

But it is said, and truly, that the Income Tax Acts have laid down certain rules to be applied in determining how the tax is to be assessed, and that, even if the result should be to tax as profits and gains what cannot properly be so called, the requirements of the Acts must nevertheless be complied with. The controversy mainly turns upon the construction to be put upon the fourth rule, which I have already quoted; but the 102nd section of the Act must be read in connection with it. That section, after enacting that income-tax shall be charged upon all annuities, yearly interest of money, or other annual payments, provides that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment; and the person so liable to make such annual payment out of the profits or gains charged with duty" shall be entitled to deduct the income-tax from the annual payment, and the person to whom payment is made is to allow such deduction.

It was admitted that, reading this enactment in conjunction with the fourth rule, the prohibition contained in that rule only applied when the annuity was payable out of profits and gains brought into charge by virtue of the Act. What is the meaning of "profits or gains," as found in the concluding words of the fourth rule? Unless the context requires a different meaning, or the words appear to be used throughout the Act in another sense, I think they must be construed according to their ordinary signification. When we speak of the profits or gains of a trader we mean that which he has made by his trading.

Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise.

In the taxing provision of the Income Tax Acts the tax is imposed in respect of the annual profits or gains arising or accruing to any person from any trade, "to be charged for every twenty shillings of the annual amount of such profits or gains." Here, it cannot be doubted, I think, the words "profits or gains" are used in the sense I have indicated. There is nothing in any part of the Act to shew the contrary. Indeed, when the rules are considered, they confirm the view that this meaning is to be attributed to the words. Their general purpose is to prohibit certain matters being taken into account which ought not to be set against the receipts when profits are being ascertained. But the scheme of the Act obviously is to tax not receipts but profits properly so called.

The 100th section prescribes that the duties under Schedule D shall be assessed and charged under certain rules. The first of these is, that the duty shall be computed on a sum not less than the full amount of the balance of the profits or gains of the trade, &c., upon a fair and just average of three years. The expression "balance of the profits or gains" is not a happy one; but the meaning obviously is the balance arrived at by setting against the receipts the expenditure necessary to earn them.

When we come to the third rule, and the first of the rules "applying to both the preceding cases," it must be admitted that the words "profits or gains" are not always used in their proper or ordinary sense. The third rule, for example, provides that, in estimating the balance of profits and gains chargeable under Schedule D, "no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains" on account of any sum expended for the repairs of trade premises, or for the supply, repairs, or alterations of trade implements beyond the sum usually expended for such purposes on an average of three years. Here it is obvious that the "profits or gains" against which the cost of repairs is not to be set, or from which it is not to be deducted, cannot be profits or gains of the business properly so called. The subject-matter necessitates the conclusion

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that language is being employed loosely and inaccurately. The rule contemplates the making up of a balance-sheet, and deals with what may be put on the debit side of it. And the first rule "applying to both the preceding cases," which commences with the same words as the rule I have just referred to, evidently requires a similar construction.

But in the fourth rule, which your Lordships have specially to construe, the language employed is very different. I can find nothing to shew that the words "profits and gains" were intended to be understood otherwise than in their proper sense. The rule prescribes that, in estimating the amount of the profits and gains "arising as aforesaid," no deduction shall be made, &c. This seems to refer back to the charging provision which I have quoted, and I have already pointed out the meaning which must be there attributed to "profits and gains." And when read in connection with sect. 102 the rule clearly relates only to annuities payable out of profits and gains "brought into charge" by virtue of the Act, and to cases in which the trader is liable to make the annual payment out of the profits or gains charged with duty.

I have pointed out that in the charging provision it is the profits and gains properly so called, not the gross receipts, which are brought into charge. If these do not exceed the expenses nothing is payable by way of income-tax. In the fourth rule there is no mention of a balance, nor is it said, as in the other rules, that no sum shall be set against the profits "on account of any sum expended" in the payment of annuities. I can see no reason why, if the intention was that contended for by the Crown, these words should not have been inserted in the third rule, instead of a fourth rule, with altered language, being added. The expression in this rule is altogether changed; the deduction prohibited is confined to annuities "payable out of" the profits or gains. This implies that the profits or gains out of which the annuity is payable are already ascertained. In the other rule there is no reference to the fund out of which the moneys expended are payable; the only thing regarded is the fact of the expenditure and the purpose for which it has been incurred. It would be a strange use of language to speak of the annuities as

"payable out of" the gross receipts of a trader merely because he is under liability to provide for them.

I think the fourth rule was primarily designed to meet such a case as that in which a trader had contracted to make an annual payment out of his profits; as, for example, when he had agreed to make such a payment to a former partner, or to a person who had made a loan on the terms of receiving such payment. But for the rule it might plausibly have been contended that in such a case a trader was only to return as his profits what remained after making such payment. It is unnecessary to define the limits within which the rule applies; but I am unable to agree with the Court below that it is applicable to the present case. The annuities are not, in my opinion, payable out of the profits and gains of the society; until the payments which they necessitate have been taken into account, it cannot be ascertained whether there are any profits and gains or not.

I do not think this view conflicts with the decision in the case of *Alexandria Water Company* v. *Musgrave* (1). The payments of interest to the debenture-holders were made out of the profits. These were ascertained by deducting from the moneys earned the expenses incurred in earning them, and of these expenses the payments to the debenture-holders formed no part. A portion of the capital was raised by shares, and another portion by debentures. There was no more reason why interest on the debenture capital should be deducted from the profits than interest on the share capital. Supposing the whole capital had been raised by shares there would have been no pretence for making any such deduction, and the profits earned by the adventure could not be different according as the capital was raised wholly by shares, or partly by shares and partly by debentures. It is by no means clear that the case was not within the prohibition of the third rule.

Although it does not appear to me that the view of the present case which I have placed before your Lordships is inconsistent with the decision in *Alexandria Water Company* v. *Musgrave* (1), I think it is in conflict with the *Mersey Loan Company* v. *Wootton* (2); but the reasoning which has led me to my present conclusion applies equally to the facts of that case.

(1) 11 Q. B. D. 174. (2) 2 Tax Cases, 316.

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LORD FIELD :—

My Lords, I have been asked by my noble and learned friend, Lord Morris, to express his entire concurrence in the judgment which has been moved, and I have no difficulty whatever in adding my own.

Order of the Court of Appeal and order of the Queen's Bench Division reversed, with costs here and below ; the respondent to repay to the appellants the amount paid by them to the respondent in respect of annuities under the Income Tax assessment for the year ending 5th April, 1886, *together with interest thereon at* 4 *per cent. ; cause remitted to the Queen's Bench Division.*

Lords' Journals 31st May 1892.

Solicitor for appellants : *R. L. Devonshire.*

Solicitor for respondent : *Sir W. H. Melvill, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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THOMAS JOHN BARNARDO . . . . APPELLANT ;

AND

MARY FORD . . . . . RESPONDENT.

GOSSAGE'S CASE.

Habeas Corpus—Appeal from Order for issue of Writ of Habeas Corpus—Issue of Writ against Person who has no longer Custody of Person detained—Illegal handing over of Person detained—Impossibility of obeying Writ—Jurisdiction of Court of Appeal—"Judgment or Order"—Judicature Act 1873 (36 *&* 37 *Vict. c.* 66).

On an application by the parent for a writ of habeas corpus in respect of a child, directed to the head of an institution for destitute children in which the child had been placed, it appeared that before the proceedings began he had without authority from the parent handed over the child to another person to be taken to Canada, and he alleged that he did not know the address of such person or where he or the child was. The Court

of Appeal affirmed an order absolute of the Queen's Bench Division that the writ should issue :—

Held, that such an order is an order within the meaning of sect. 19 of the Judicature Act 1873, and that an appeal lies from it to the Court of Appeal :—

Held also, affirming the decision of the Court of Appeal (24 Q. B. D. 283) but without expressing any opinion as to the circumstances under which the child was sent to Canada, that the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ, in order that the facts might be more fully investigated.

The law as laid down in *Reg.* v. *Barnardo, Tye's Case* (23 Q. B. D. 305) disapproved by Lord Halsbury L.C. and by Lords Watson, Herschell and Hannen.

APPEAL from an order of the Court of Appeal reported as *Reg.* v. *Barnardo, Gossage's Case* (1).

The following statement of facts is taken from the judgment of Lord Herschell :—

The appellant is the founder and director of certain institutions, comprising homes for destitute children. The respondent is the mother, by a former marriage, of a boy named Harry Gossage. In the autumn of 1888 a clergyman residing at Folkestone wrote to the appellant requesting him to receive into his home the boy, Harry Gossage, whom he had found in Folkestone destitute and homeless. The boy accordingly became an inmate of the appellant's homes. One of the officials of the homes wrote to the mother of the boy, and received a letter from her dated the 29th of September in which she said, "I shall be very pleased if you will keep my son, Harry Gossage, in Dr. Barnardo's home, as I cannot afford to keep him myself." On the 11th of November Mr. Newdigate, a gentleman residing at Leamington but who was a stranger to the appellant, wrote a letter to him stating that Mrs. Gossage had called upon him to express her desire for a Catholic home for her boy, and informing him that St. Vincent's Home, Harrow Road, was prepared to receive him, and that he was writing to the Rev. D. Hope to arrange the transfer. On the 16th of November Mr. Hope accordingly wrote to Dr. Barnardo that he proposed sending for the boy, and inquiring what time of day he should send. Some correspondence followed between the appellant or his representatives

(1) 24 Q. B. D. 283.

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and Mr. Newdigate in which the appellant declined to consent to the transfer of the boy to the Roman Catholic institution. On the 1st of January 1889 Mr. Newdigate enclosed a document signed by the mother expressing her desire that her son should at once be transferred by Dr. Barnardo to Mr. Hope, who had undertaken to place him in St. Vincent's Home, Harrow Road, London. The letter informed Dr. Barnardo that unless the mother's order was complied with within seven days he should instruct his solicitor to take out a writ of habeas corpus. A letter followed from Mr. Hope, which was answered on the 8th of January by the secretary of the appellant's homes in these terms: "I am instructed to inform you that it is not possible to comply with your request as the boy in question is not and has not been for a considerable time an inmate or under the control of these institutions." On the 1st of March following the appellant was served with a summons to attend a judge of the Queen's Bench Division to shew cause why a writ of habeas corpus, commanding him to produce the body of the said Harry Gossage, should not be issued. Several affidavits were filed before the summons came on for hearing. In one filed by Dr. Barnardo he stated that before he received any application from the mother for the return of the child, he, on the 16th of November 1888, transferred him to the care of a Mr. William Norton, an American gentleman, who was at that time on a visit to this country, and that he believed that the boy was taken by Mr. Norton to Canada a few days later. He further deposed that he had not, since he handed over the boy, heard either from him or Mr. Norton, that he did not know where he or Mr. Norton was, that he had no means of communicating with either of them. He further stated that before handing over the boy he satisfied himself that Mr. Norton was a fit and proper person to have the custody of the child. In an affidavit sworn a few days subsequently he deposed that the said Harry Gossage was not then, and since the 16th of November 1888, when he transferred him to the care of Mr. Norton, had not been in his custody or power.

The summons came on for hearing before Mathew J. on the 14th of March 1889, when the learned judge, having read the affidavits filed and heard the cross-examination of the appellant,

refused to order the writ to issue. No further steps were taken till the 23rd of November 1889, when a rule nisi was granted for a writ of habeas corpus by the Divisional Court of the Queen's Bench. In the meantime the case of *Reg.* v. *Barnardo, Tye's Case* (1) had been decided in the Court of Appeal. This was a decision affirming an order of the Queen's Bench Division quashing a return to a habeas corpus and granting an attachment against the defendant for contempt.

It was in consequence of the judgments given in the Court of Appeal, which laid down that it was not an excuse for non-compliance with a writ that the defendant had parted with the custody of the child to another person if he had done so wrongfully, that the application was again made for a writ of habeas corpus in the present case. In addition to the affidavits used on the former application further affidavits were filed. For reasons appearing in the judgments it is thought unnecessary to enter upon an examination of any of the affidavits.

It will be sufficient to state that Dr. Barnardo deposed that it was on the 10th of November 1888 that he first made the acquaintance of Mr. Norton, into whose custody he delivered the boy, that Mr. Norton shewed him letters of introduction from well-known people in Canada, and stated that his object was to discover if Dr. Barnardo could place a little boy under his care, that he was anxious to find a boy who would not be interfered with by his relations, as he wished if he liked the boy to adopt him as his son. Dr. Barnardo accordingly brought five of the boys in his home to see Mr. Norton, amongst whom was Harry Gossage. After talking with him for some time Mr. Norton asked to be allowed to adopt him. Dr. Barnardo accordingly arranged that he should be ready on the 16th of November, and on that day when Mr. Norton again came to the homes he took the boy away with him. According to Dr. Barnardo's statement, Mr. Norton expressed himself as very anxious that there should not be any interference on the part of the child's relatives, and his affidavits stated that he did not know where Mr. Norton or the boy then were, nor did he know their or either of their

(1) 23 Q. B. D. 305.

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addresses, and that he had no means of communicating with them or either of them.

After hearing argument, the Queen's Bench Division (Lord Coleridge C.J. and Bowen L.J.) made absolute the order for the issue of the writ, and this order was affirmed by the Court of Appeal (Lord Esher M.R. and Fry L.J.) (1).

This appeal first came on for hearing before Lord Halsbury L.C. and Lords Bramwell, Herschell, Field and Hannen on the 24th of April 1891, when a preliminary objection was taken, that from an order of the High Court for the issue of a writ of habeas corpus no appeal lies to the Court of Appeal. Counsel were desired to confine their arguments to this point.

Sir *W. Phillimore* (*Joseph Walton* and *Forbes Lankester* with him) for the respondent:—

No appeal lies to the Court of Appeal. Formerly the application for a habeas corpus was made ex parte. The rule to shew cause is a modern practice. The earliest reported instance is believed to be in 1784: *Wade's Case*, reported in a note to *Blake's Case* (2); and see *The Hottentot Venus* (3); *Guérin* v. *Bank of France* (4). To give a right of appeal under sect. 19 of the Judicature Act 1873 there must be a "judgment or order" of the High Court. These words do not include an order for the issue of a writ of habeas corpus, which is merely a direction that the process of the Court shall issue. *Cox* v. *Hakes* (5) is an authority against the right of appeal.

Rigby Q.C. (*Finlay* Q.C. *Cock* Q.C. and *W. Baker* with him) for the appellant:—

When the summons to shew cause is granted there is litis contestatio, and the decision on that is appealable. Sect. 19 of the Judicature Act was intended to enlarge the area of appeals and it must be construed in that view: *Overseers of Walsall* v. *London and North Western Railway Company* (6). The right of appeal includes an order for the issue of a writ of mandamus, several appeals from an order for a mandamus having been heard

(1) 24 Q. B. D. 283.
(2) 2 M. & S. 428.
(3) 13 East, 195.
(4) 5 Times L. R. 160.
(5) 15 App. Cas. 506.
(6) 4 App. Cas. 30.

by the Court of Appeal: e.g. *Julius* v. *Bishop of Oxford* (1); and *Allcroft* v. *Bishop of London* (2). It is therefore no objection to the right of appeal that the order merely directs the issue of a process of the Court.

Sir *W. Phillimore* in reply.

The House took time for consideration upon the preliminary objection. On the 4th and 5th of April and the 6th of May 1892 the appeal was heard upon the merits before Lord Halsbury L.C. and Lords Watson, Herschell, Macnaghten, Morris and Hannen. The House gave no decision as to what the facts really amounted to, and the arguments on this point are omitted. It is enough to say that

Rigby Q.C. and *Cock* Q.C. (*Finlay* Q.C. and *W. Baker* with them) for the appellant contended that the appellant had bonâ fide parted with the custody of the child before he had any notice of the mother's desire to recover him, and that the child being out of his power and beyond his means of discovery when the order nisi was moved for the writ ought not to issue, for it was impossible for him to obey it; that in the cases relied on by the respondent: *R.* v. *Viner* (3); *Reg.* v. *Roberts* (4), and *In re Matthews* (5) the defendants were seeking to evade the process of the Court and practically had the children in their custody or control; and that the law laid down by the Court of Appeal in *Reg.* v. *Barnardo, Tye's Case* (6) and in the present case went far beyond precedent and should be overruled; also that the application by the mother was not bonâ fide. They also referred to 56 Geo. 3 c. 100 s. 3.

Joseph Walton and *Forbes Lankester* (Sir *W. Phillimore* with them) for the respondent contended that the appellant had sent the child away in order to evade the process, and that the decision of the Court of Appeal was right, referring especially to the judgment of Fry L.J.; but that at all events the respondent was entitled to require that the appellant should make a return

(1) 5 App. Cas. 214.
(2) [1891] A. C. 666.
(3) 2 Lev. 128.
(4) 2 F. & F. 272.
(5) 12 Ir. C. L. Rep. 233.
(6) 23 Q. B. D. 305.

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to the writ in order that he might be cross-examined and that a further and fuller investigation of the facts might be made.

Cock Q.C. in reply.

The House took time for consideration.

July 25. LORD HALSBURY L.C.:—

My Lords, as to the preliminary point in this case, I have entertained grave doubts, and I cannot say that even now those doubts have been entirely removed; but it does not seem to me a question upon which I should insist so strongly on my own opinion that I should differ from the rest of your Lordships.

My Lords, as to the merits, I was for a considerable time under the impression that both parties were arguing this question upon the view that the facts were already ascertained, and that, whatever the form of procedure, it was upon a substantially agreed state of the evidence, though, of course, they differed upon the question what inference should be drawn from the state of the evidence so already ascertained. Very late in the argument it turned out that the parties (at least, one of them) did not acquiesce in that view, but desired a return to the writ, so that upon the return further questions of evidence might be raised.

My Lords, I think it was unfortunate that some indication of that contention did not earlier appear, either before your Lordships or in the Courts below.

Of course it is true to say that the respondents, when they found the Court was in their favour upon the state of the evidence as it then appeared, were not bound to raise the further question as to what might appear on the return, and what might happen when the return was made. I do not, therefore, think that they have prejudiced their right to a return.

As, therefore, there is to be a return, and more evidence may be adduced to shew what is the real state of the facts, I designedly abstain from saying anything which may preclude me from forming a perfectly unbiassed judgment when all the facts have been finally ascertained. But it is of importance, I think,

to say, since it may tend to shorten the inquiry which the respondents suggest that they propose to make, that I cannot acquiesce in the view that some of the learned judges below seem to have entertained, that if a Court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the Court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. My Lords, this is a view that I cannot agree to. I think, under such circumstances, the writ ought not to issue at all, as it is not the appropriate procedure for punishing such conduct.

Of course, where a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a Court may and ought to examine into the facts by the writ of habeas corpus, because the detention is in fact being continued by someone who is really the agent of the original wrong-doer to continue and persist in the unlawful detention. But, assume the fact that the detention has ceased, then the writ of habeas corpus is, in my judgment, inapplicable.

For the reasons I have given—I say nothing about the facts in this case, but treating the facts as still open to inquiry—I think this appeal should be dismissed, upon the ground that the respondents have a right to the return, and I so move your Lordships.

LORD WATSON:—

My Lords, I concur in the judgment which has been proposed by the Lord Chancellor. Seeing that the writ must go, and that the appellant will have the opportunity of making further explanations, I refrain from comment upon the facts already in evidence; but I wish to make it clear that my reasons for agreeing with the judgment moved are not quite the same with those by which some of the learned judges in the Court below were influenced.

The remedy of habeas corpus is, in my opinion, intended to facilitate the release of persons actually detained in unlawful

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custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed, and rightly so, because it is the fact of detention, and nothing else, which gives the Court its jurisdiction.

I find that in *Reg.* v. *Barnardo, Tye's Case* (1), Lindley L.J. said: "As matter of law, I think that it is no valid excuse for not producing a child or other person in obedience to a writ of habeas corpus to state inability to obey, if such inability is the result of the previous illegal conduct of the person to whom the writ is addressed." His Lordship added: "Persons who illegally put a child out of their power do so at their peril, and if they are ordered to produce the child, no excuse founded on their own inability to comply with the order will be held a sufficient answer to the writ." The circumstances of that case were not altogether the same with those with which your Lordships have to deal. The Master of the Rolls does not appear to have differed in opinion from Lindley L.J. whilst Cotton L.J. seems to have treated the case as one of contempt in parting with the custody of the child. In the present case, Lord Esher has adopted and repeated, in forcible language, the view expressed by Lindley L.J. in *Reg.* v. *Barnardo, Tye's Case* (1), although his Lordship's observations are mainly directed to the case of a child.

I venture to doubt whether the law laid down by Lindley L.J. in these broad terms is sound. If it be so, then the writ may be used as a convenient process for punishing a gaoler who has connived at the escape of one of the prisoners under his charge. I see no difference in principle between the case of a gaoler so misconducting himself and the case of a man who unlawfully parts with the custody of an infant. To order the latter to recover the custody of the child, and to place its person at the disposal of the Court, may and probably will necessitate the employment by him of agents and detectives, and application

(1) 23 Q. B. D. 315.

for the assistance of foreign Courts, which, in my opinion, are neither more or less than penalties imposed in respect of his breach of duty. I do not for a moment suggest that there is not a legal wrong committed in both cases; but that wrong is the very reverse of illegal detention, for which alone the writ of habeas corpus was meant to give a remedy. If there be no other remedy in such cases I am satisfied that it is for the legislature, and not for any Court, either of law or equity, to provide one; and I cannot see the propriety of the Court applying to these cases a remedy which was intended for a totally different purpose. It is, in my opinion, a grave objection to the use of habeas corpus for punitive purposes that the prosecutor would have the unusual privilege of hunting the offender from court to court until he found a tribunal willing to convict. Although that privilege has been conceded in all cases where there is actual detention, I can hardly conceive that the legislature would tolerate it in cases where detention has ceased.

Where it is shewn to the satisfaction of the Court that the person charged with unlawfully detaining a child or adult had de facto ceased to have any custody or control, I am of opinion that the writ ought not to issue. A man who parts with the custody of a child after he is served with the process of the Court, or who evades service in order that he may get rid of such custody, commits a plain contempt, for which he is answerable to the Court. Even in that case I doubt whether it is competent, and I do not doubt that it is inexpedient, to enforce the writ de plano. The case ought to be dealt with, in such circumstances, as one of contempt; and the Court has power to pronounce an order which will compel the quondam custodian to choose between placing himself in a position which will make him liable to the writ and bearing the consequences of his contumacy. I think it right to add that, in my opinion, no contempt is committed by a person who, lawfully or unlawfully, absolutely gives up the custody and control of a child from the mere apprehension that by retaining it he may become liable to a writ of habeas corpus, and without any notice that such a proceeding will be taken.

In March 1889, eight months before this proceeding commenced, a similar application was made to Mathew J., who, after

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hearing the cross-examination of the appellant by counsel on behalf of the respondent, came to the conclusion that he had ceased to have the custody or control of the boy, Harry Gossage, in November 1888. In the circumstances the learned judge, taking what I conceive to be the right view of the law, refused to issue the writ. Four months afterwards the decision of the Court of Appeal was given in *Reg.* v. *Barnardo, Tye's Case* (1), and it is difficult to resist the impression that the present proceedings were brought in order to get the benefit of the novel doctrine laid down in that case, which had found no favour with Mathew J. Had there been no other reason for sustaining it, I should not have hesitated to reverse the judgment appealed from. But I willingly defer to those of your Lordships who are of opinion that the case may be more conveniently disposed of after a return has been made to the writ, although I am not inclined to prolong litigation of this kind, which is little calculated to advance the interests of institutions engaged in the useful work of reclaiming children from the streets. When a waif has been taken up and cared for by one of them, he apparently becomes an object of interest and competition, and funds are wasted in litigation which would be better employed in the rescue of children who are still uncared for.

LORD HERSCHELL :—

My Lords, at the hearing of this appeal the preliminary objection was taken that no appeal lay from an order that a writ of habeas corpus should issue. It was pointed out that a rule or order calling on a person to shew cause why a writ of habeas corpus should not issue is of modern origin, that application for the writ was formerly made ex parte, and that the service of the writ was the first step which affected the party alleged to be detaining another in illegal custody; and it was contended that the order made by a Court or judge that a writ of habeas corpus should issue was not a "judgment or order" within the meaning of the appeal section of the Judicature Act. It was urged that it was merely a direction by the Court or a judge that a process of the Court should issue, and that from such an order or direction

(1) 23 Q. B. D. 305.

no appeal could lie. At the close of the argument I was disposed, in common I believe with those of your Lordships who heard the appeal, to accede to this view; but subsequent consideration has led me to the conclusion that it cannot be sustained.

The appeal section is very general in its terms, and it has received a wide interpretation in this House in the case of the *Overseers of Walsall* v. *London and North Western Railway Company* (1). I see no safe ground for holding that it is inapplicable to the issue of a writ of habeas corpus except that suggested; namely, that such an order merely directs the issue of a process of the Court. But it seems to me that if on this ground it were held that no appeal lay, the decision must logically have a much wider scope. An order for the issue of a writ of mandamus might equally be said to be a direction for the issue of the process of the Court. Before the Judicature Act no appeal lay from such an order; but it has been held that under the appeal section of the Judicature Act such an order may now be made the subject of an appeal.

I am unable to see on what basis the decision that the order now under consideration was not within the appeal section could be rested which would not logically apply to a writ of mandamus, and, indeed, to a writ of prohibition, and to other cases which might be mentioned. I think that the House would hesitate before arriving at the conclusion that no appeal lay in the class of cases to which I have referred, the view that they were within the appeal section having long been acted upon, and being obviously convenient, as tending often to expedite litigation and to diminish its cost. On the other hand, I do not think there is any difficulty in holding that an order for the issue of a writ of habeas corpus, even when made ex parte, is an "order" within the purview of the appeal section of the Judicature Act. It is to be observed that in the Act of Geo. 3, where duties were imposed on the judge in relation to writs of habeas corpus, the language used is that the judge is to "award" a writ of habeas corpus. And it is certain that the practice of proceeding by a rule or order nisi on the application for a habeas corpus was well established at the time the Judicature Act was passed. An "order" absolute for a habeas corpus

(1) 4 App. Cas. 30.

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was then a common order. I would further point out that if an appeal from such an order as this were held to be incompetent, considerable injustice might often result. The Court of Appeal, when entertaining an appeal—which of course they would in general be competent to do—from the order made by the Court below on the return of the writ, might reverse that order on the ground that the writ ought never to have been issued; but they would be unable to deal with the costs incurred in relation to the order for the writ, which would have to be borne by the party against whom the application for the writ had improperly been made.

Upon the whole, I have come to the conclusion that this appeal must be held to be competent.

My Lords, I now proceed to deal with the merits of the appeal.

[His Lordship here stated the facts set out above, and after stating the effect of the judgment of the Court of Appeal proceeded as follows:—]

If in order to support this judgment it were necessary to give my adhesion to the law laid down in the case of *Reg.* v. *Barnardo, Tye's Case* (1) I should hesitate much before doing so.

Having regard to the nature of a writ of habeas corpus and the purpose for which it was designed and has hitherto been employed, I cannot feel satisfied, as at present advised, that it is not a good return to the writ that the person to whom it relates was not at the time it was issued in the custody, power, or control of the person upon whom it is served. The doctrine that he must also shew that before the writ was issued or before he had notice of the application for its issue he had not wrongfully parted with the custody of the person named in the writ is novel, and appears to me to involve great difficulty. A gaoler who has allowed a prisoner to escape has wrongfully parted with the custody of that person; could he be commanded by a writ of habeas corpus issued after the escape to produce him and be committed for contempt of Court if he failed to do so? Other illustrations might be given to shew the difficulty of assenting to the broad proposition laid down in the Court of Appeal. The question is not whether one who has parted with

(1) 23 Q. B. D. 305.

the custody of a person committed to his care can be made amenable to the law if he wrongfully parts with that custody, but whether the writ of habeas corpus is the appropriate remedy. The terms of the writ require the recipient to have the body of the person named in it "taken and detained under your custody, as is said, together with the day and cause of his being taken and detained, to undergo and receive all and singular such matters and things as the said Court shall then and there consider of concerning him in this behalf." This indicates that the very basis of the writ is the allegation and the primâ facie evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody. To use it as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it.

But the question remains whether, even assuming that the decision in *Reg.* v. *Barnardo, Tye's Case* (1) was not well founded, the appellant is entitled to have the order that the writ should issue discharged. I have already given my reasons for thinking that this House cannot reject as incompetent an appeal against an order for the issue of a writ of habeas corpus; but I feel most strongly that such appeals are not to be encouraged. Where any tribunal believes that a person is or may be under detention in unlawful custody, and issues a writ of habeas corpus accordingly, no Court of Appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be, beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of or any control over the boy alleged to be detained, that might have been ground for reversing the order of the Queen's Bench Division. But where the Court entertains a doubt whether this be the fact, it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it. Now, it is impossible to read the judgment of the Lord Chief Justice without seeing that he did entertain such a doubt, and that he was not prepared

(1) 23 Q. B. D. 305.

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upon the affidavits to accept as conclusive the statements of the appellant. At your Lordships' bar the counsel for the respondent contended that they had a right to cross-examine the appellant, and that the proper occasion on which to try the question was when he had returned to the writ that he was not detaining the child, and that it was not, at the time the writ was issued, in his custody, power, or control. I think this view is the correct one; the truth of the return may, no doubt, be put in issue, and I feel myself unable to advise your Lordships that the Queen's Bench Division were not in point of law justified in issuing the writ. I must not be understood as indicating that I think the story told by the appellant is untrue. But, as the matter is to undergo further investigation, it would obviously be improper to enter upon any discussion of the statements contained in the affidavits, or to express any opinion upon them. I come to this conclusion with some regret, as the question intended to be raised by this appeal is one of no small importance. But, in my opinion, it was premature to raise it at the present stage, and I think it very important not to set a precedent which might prove prejudicial to the liberty of the subject of which the writ of habeas corpus is the most effectual safeguard.

For these reasons, I think the judgment appealed from must be affirmed.

LORD MACNAGHTEN:—

My Lords, I do not dissent from the motion which has been proposed. I cannot say that this is a case in which there ought not to be an opportunity of further inquiry into the circumstances under which Dr. Barnardo parted with the child, and ascertaining beyond all doubt whether the child is or is not still under Dr. Barnardo's control or within his reach. In a matter of this sort it would not, I think, be desirable to interfere with the discretion of the Court below, unless a stronger case for interference were made out than the one which the learned counsel for the appellant have been able to present.

Whether the child if it can be got back ought to be handed over to the mother, or dealt with in accordance with her directions, or directions given in her name, is another question, upon which it would not be proper to intimate an opinion at present.

Whether or not Dr. Barnardo has rendered himself liable to an attachment may be a matter to be discussed hereafter. That question also ought, I think, to be left wholly unprejudiced by any comment upon facts or circumstances which have not as yet been thoroughly sifted or tested by cross-examination.

I desire, however, to state my concurrence with the opinion expressed by Sir Edward Fry. I entirely agree with him in thinking that the writ of habeas corpus ought not to be wrested from its proper purpose and used as an instrument to punish a man for an illegal or unauthorized act complete before the jurisdiction of the Court can be supposed to have attached. I will only add that it is very much to be regretted that the managers of a charitable institution which has done, and is, I have no doubt, doing an immense deal of good, should have tried to put off a troublesome correspondent by letters which, to say the least, were uncandid and misleading.

LORD MORRIS :—

My Lords, I concur in the judgment which has been moved; but I desire to say that in doing so I adopt the reasons assigned and the views given of the law, both in the Queen's Bench Division and in the Court of Appeal, as the foundation of my concurrence in the judgment.

LORD HANNEN :—

My Lords, I entirely concur in the conclusions at which your Lordships have arrived, and I have only to add that the opinion expressed by my noble and learned friend, Lord Herschell, so exactly represents the view which I take of the case that I do not think it necessary to add anything to what has fallen from the noble and learned Lord.

Order appealed from affirmed and appeal dismissed with costs; the time for making the return to the writ of habeas corpus extended to three months from the date of this judgment.

Lords' Journals 25th July 1892.

Solicitors for appellant: *Nisbet & Daw.*
Solicitors for respondent: *Leathley & Phipson.*

[HOUSE OF LORDS.]

H. L. (E.) 1892 May 10.

JULIA JOSEPHINE SCALE AND ANOTHER APPELLANTS;

AND

RAWLINS AND OTHERS . . . . . RESPONDENTS.

Will—Construction—Gift of Income—Life Estate—Gift over—Death "without leaving Children"—Implied Gift to Children—Residuary Gift.

A testator gave three freehold houses to his nephews S. and W. upon trust to pay the rents and interests to his niece during her life for her separate use, and after her decease "(she leaving no child or children)" he gave one of the houses to S. and the two others to W. After making other bequests the testator gave the residue of his real and personal estate to S. and W. equally. The niece died leaving children:—

Held, affirming the decision of the Court of Appeal (45 Ch. D. 299), that the niece took a life interest only, and that on her death the houses passed under the ultimate residuary gift to S. and W. equally, there being no implied gift to her children.

APPEAL from an order of the Court of Appeal (Cotton, Bowen and Fry L.JJ.) reversing a decision of Kay J. The terms of the will and the devolution of the respective interests are fully stated in the report of the decision below (1). The only point raised by the appeal was that stated in the head-note.

May 9, 10. *Firminger*, and *C. Herbert Smith*, for the appellants (a daughter of the niece and her husband):—

The construction adopted below leads to an absurdity. It is impossible to suppose that if the testator's niece died leaving no children he intended the houses to be unequally divided between his nephews S. and W., and that if she died leaving children S. and W. were to take the houses equally. What possible connection can there be between the birth of children to the niece and the inequality of the gifts to S. and W.? There are only two reasonable constructions. Either (as Kay J. held) the niece took an absolute interest in fee simple in the houses, subject to defeasance if she left no children: see *Watkins* v.

(1) 45 Ch. D. 299.

Weston (1); *Cropton* v. *Davies* (2); or there was an implied gift to her children. There are indications in the will that the testator intended the niece's children to take: see *Ex parte Rogers* (3), where a similar intention appeared.

[LORD HALSBURY:—I have often had occasion to say of a case upon the construction of a will, that was a decision on a particular will, the judge looking at every word of the special clauses. How can it be an authority upon the construction of another and a different will?]

[They also referred to the cases cited in the report of the decision of the Court of Appeal.]

Sir *H. Davey* Q.C. and *Upjohn* for the respondent E. S. Rawlins (the only respondent who appeared) were not heard.

LORD HALSBURY L.C.:—

My Lords, in this case I cannot help thinking that there is not any doubt as to what a Court of construction ought to do. The difficulty which I have here is not in speculating upon what peradventure may, at some time or other, have been in the testator's mind; but I must find words which are absolute and express. I might be perfectly satisfied that he intended that this lady should have an estate of inheritance in this property. I might be satisfied that that was his intention otherwise than by the words of the will; but I should be compelled to come to the same conclusion as I do now, namely, that that intention is not sufficiently expressed. It is manifest that taking either alternative proposition put forward by the appellants this House, if it is called upon to give that effect to the instrument, must put words into the will in order to do it. The thing has not been done; and I am not aware of any authority which would lead your Lordships to come to the conclusion that, because the testator had at some time or other the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed.

(1) 3 D. J. & S. 434. (2) Law Rep. 4 C. P. 159.
(3) 2 Madd. 449.

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Now there are two cases which have been brought before your Lordships with the view of shewing that, where you cannot consider anything but the will, you can add words to give effect to the intention of the testator. First of all it is said that you must assume that the testator stated that he gave an estate limited for life (which he did in express terms) but did not mean it—that, taking that with other parts of the will, although he made the estate of gift simply one for life, and expressly and in terms used those words, he did not mean it. I think it would be a very strong thing to control and override such words by any other part of the will unless it is explicit. But I cannot find anything which leads to that inference. Assuming that you could override the express words I can find nothing to override or explain away those words. The testator has expressly said that he has given an estate for life, and I cannot get rid of those words.

Then it is said that he intended to make a gift to the children. Again I say that he does not do so. I cannot say that he had not the intention, but all I can say is that he has not expressed it, and your Lordships cannot put in words simply because you may have some suspicion that in making his testamentary disposition that was the intention in his mind.

My Lords, I think that that cardinal proposition disposes of this case; and I cannot go into an inquiry as to another case where the context is different, and there are different circumstances. That course would be calculated to mislead in such a case as this. I base my judgment simply upon the ground that in either of the two alternative interpretations which are suggested a meaning is sought to be put upon the words which is not justified by any words that I can find in the will at all.

I therefore think that the judgment of the Court below ought to be affirmed, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Court of Appeal must be affirmed. We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to

any intention which is not expressed or plainly implied in the language of his will.

I am unable to concur in the view taken in the Court of first instance by Kay L.J. Even assuming that the primary construction of the testator's words may lead to a somewhat absurd result, the difficulty cannot be got over in this case by attaching their secondary meaning to words which occur in his will, but only by inserting in the instrument words which are not to be found there.

LORDS HERSCHELL, MACNAGHTEN, MORRIS and HANNEN concurred.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 10th May 1892.

Solicitors for appellants: *Perkins & Sawyer.*
Solicitors for respondent E. S. Rawlins: *Moon, Gilks, & Moon.*

[HOUSE OF LORDS.]

WILLIAM COWLEY (PAUPER) . . . . APPELLANT;

AND

THE NEWMARKET LOCAL BOARD . . RESPONDENTS.

Highway—Urban Authority—Surveyor of Highway—Liability to Action for Non-repair of Highway—Statutory Duty, Breach of—Public Health Act 1875 (38 & 39 *Vict. c.* 55) *ss.* 144, 149.

A highway was by virtue of the Public Health Act 1875 vested in and under the control of a local board as the urban authority for the district. Sects. 144 and 149 of that Act provide that the urban authority shall have and be subject to all the powers duties and liabilities of surveyors of highways, and shall from time to time level alter and repair the highways vested in them as occasion may require. An owner of land adjoining the highway in making an approach to his land without the sanction or authority of the local board made a drop in the level of the highway and left it in a dangerous condition. The appellant walking along the highway fell down the drop and was injured. In an action by him against the local board for suffering the highway to be out of repair and in a dangerous

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condition it appeared that the local board was chargeable only with non-feasance and not with misfeasance:—

Held, affirming the decision of the Court of Appeal, that no action lay against the local board.

Gibson v. *Mayor of Preston* (Law Rep. 5 Q. B. 218) approved.

APPEAL from a judgment of the Court of Appeal affirming a judgment of the Queen's Bench Division.

The appellant brought an action against the respondents, alleging in his statement of claim that the defendants wilfully, wrongfully, and negligently built and placed and suffered to remain on the footway of the highway leading from Newmarket to Bury St. Edmund's, at a point opposite to the entrance of the yard and stables of one Captain Machell, a brick wall and a declivity formed thereby, without any guard or light or means to prevent persons from falling over the same; also that the defendants wrongfully suffered and permitted the footway to be and continue out of repair and in a state and condition dangerous to foot-passengers using the same; and that by means of the said wrongful and negligent acts of the defendants, the plaintiff, while lawfully using and walking upon and along the footway after daylight had ceased, fell over the brick wall and down the declivity and sustained severe injuries.

At the trial before Denman J. and a common jury at Ipswich the following facts were proved or admitted:—

The Bury Road where the plaintiff was injured was a portion of a highway within the district for which the defendants were the urban authority. In 1873 Captain Machell being the owner of property adjoining the Bury Road made an entrance into his stable yard by cutting through the footpath which formed part of the highway. His property being on a lower level than the highway the entrance sloped downwards towards the stables, and Captain Machell built two dwarf walls to sustain the footpath on each side of the slope, thus making a drop of about eighteen inches in the footpath. This was done without the authority or sanction of the local authority. Up to 1886 the footpath at the point in question was covered with grass; after 1886 it was gravelled by the defendants. The plaintiff walking along the footpath one evening after dark in January 1889 fell

over one of the dwarf walls into the slope and was hurt. The nearest lamp to the spot where he fell was about seventy yards.

The jury found a verdict for the plaintiff for £200, and in answer to questions put by the learned judge found that there was no negligence on the part of the plaintiff; that the defendants were guilty of negligence, and that the negligence consisted of "the combination of leaving the dwarf wall there and not supplying sufficient light." Upon further consideration Denman J. being of opinion that no cause of action had been made out entered judgment for the defendants. This decision was affirmed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.).

May 17, 19. *A. H. Poyser* and *F. K. North* for the appellant:—

The decisions appealed against went upon the ground that the defendants were in the same position as that of a surveyor of highways under the old law and not chargeable with misfeasance, but only with non-feasance. But for several reasons those decisions are unsound. No doubt under the old highway law it was held that no action would lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair: *Russell* v. *The Men of Devon* (1); nor against the county sued in the name of the surveyor: *McKinnon* v. *Penson* (2); nor against the surveyor for an accident caused by his neglect to repair the highway: *Young* v. *Davis* (3). But those decisions rested on the grounds that the surveyor being an individual it would be highly inconvenient to have actions brought against him, and that a penalty was imposed on the surveyor by the Highway Act (5 & 6 Wm. 4 c. 50). A local board would not be subject to any penalty, for the liability to specific penalties is not transferred by the general words of the Public Health Act 1875. The liability of the defendants rests on the provisions of that Act (38 & 39 Vict. c. 55). By sect. 144 the urban authority is to execute the office of and be surveyor of highways and to have and be subject to all the powers, authorities, duties and liabilities of surveyors of highways under the law for the time being in force. Sect. 149 creates

(1) 2 T. R. 667. (2) 8 Ex. 319; 9 Ex. 609.
(3) 2 H. & C. 197.

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a distinction between the old surveyor and the urban authority. It enacts that highways shall vest in and be under the control of the urban authority. The highway was not vested in the surveyor. Then sect. 149 enacts that the urban authority shall from time to time cause the highway to be levelled, paved, &c., altered and repaired as occasion may require, with power to cause the soil of the streets to be raised, lowered or altered as they may think fit, and to place and keep in repair fences and posts for the safety of foot-passengers.

The verdict of the jury finds that there was a clear breach by the defendants of the duty imposed by sect. 149 in not repairing this highway and in leaving it in a dangerous condition. By sect. 161 the urban authority has power to contract with any person for the lighting of the highways, and may provide such lamps and other materials and apparatus as they may think necessary for lighting the same. And the neglect to provide a sufficient light is also found by the verdict. For these breaches of statutory duties the defendants are liable on the principle established by *Couch* v. *Steel* (1). The decision in *Gibson* v. *Mayor of Preston* (2) no doubt seems adverse to this contention; but that case should be overruled; it is not consistent with *Hartnall* v. *Ryde Commissioners* (3) which is a strong authority in favour of a right of action for breach of a statutory duty. There the judgment went on the ground that the defendants being liable to be indicted for the non-repair, an action lay by a person specially aggrieved. See also *Ohrby* v. *Ryde Commissioners* (4); and *Bathurst* v. *Macpherson* (5).

Further, the defendants are liable for leaving the highway in a state of danger of the nature of a trap; they caused the footpath to be gravelled and so invited the public to walk on it with the risk of falling over the dwarf wall into the slope. This makes them liable (even though there be no misfeasance) upon the principle of the cases exemplified by *Barnes* v. *Ward* (6); and *White* v. *Hindley Local Board* (7); and see *Wandsworth Board of Works* v. *United Telephone Company* (8).

(1) 3 E. & B. 402.
(2) Law Rep. 5 Q. B. 218.
(3) 4 B. & S. 361.
(4) 5 B. & S. 743.
(5) 4 App. Cas. 256.
(6) 9 C. B. 392.
(7) Law Rep. 10 Q. B. 219, 223.
(8) 13 Q. B. D. 904.

Winch Q.C. and *W. Baugh Allen*, for the respondents, were not heard.

The House took time for consideration.

Aug. 9. LORD HALSBURY L.C.:—

My Lords, the effective part of the plaintiff's complaint is to be found in the third paragraph of the statement of claim: "That the defendants wilfully, wrongfully, and negligently built and placed and suffered to remain on the footway of the highway leading from Newmarket to Bury St. Edmund's, at a point opposite to the entrance of the yard and stables of one Captain Machell, a brick wall and a declivity formed thereby, without any guard or light or means to prevent persons from falling over the same." And (paragraph 6) "that the plaintiff while lawfully using and walking upon and along the said footway after daylight had ceased fell over the said brick wall and down the said declivity and suffered damage accordingly."

The facts were that the defendants are the Newmarket Local Board of Health, and the footway and the highway referred to were within the limits and under the care and management of the defendants as such local board of health; and the question appears to resolve itself into whether the public authorities in whom the highways are vested by the statute can be held liable in an action for any defect in the repair. I think in this case the liability would have to be put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

As long ago as 1788 a question of an analogous character was raised in the Court of King's Bench; and the argument then as now, was that where one person receives an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission.

In that case it was said (which seems to me to be decisive of this case) that the principle which decides against this kind of

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action is accurately stated in Brooke's Abridgment, tit. Action on the Case, pl. 93, where it is said that "if an highway be out of repair by which my horse is mired no action lies, 'car est populus et surra reforme per presentment,' which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect": *Russell* v. *The Men of Devon* (1).

That that has been considered to be the law for now more than a hundred years is certain, and as has been pointed out the objection in point of form to an action against the surveyor of the highways was not only an objection of form, but underlying it there was the objection of substance.

The question of whether it was form or substance came before the Court of Exchequer in *McKinnon* v. *Penson* (2). The effort there had been to argue that inasmuch as the county could not in point of form be sued, and that previous judgments had referred to that fact, the 43 Geo. 3 c. 59 s. 4, which enacted that the county might be sued in the name of its surveyor, disposed of the objection of form, as indeed it did. But the Court went on to say that that statute did not give and was not intended to give an action for such an injury against the county, but that in cases where rights could be maintained against the county an action might be brought against them in the name of their surveyor. That was therefore a distinct authority that no new right of action was intended to be created, and so far as I am aware that has continued to be the state of the authorities down to the present time.

It is true that in the case of *Hartnall* v. *Ryde Commissioners* (3) a construction was placed upon a particular local Act which rightly or wrongly was assumed from its particular terms to have established and created for the first time a right of action for an injury resulting from a breach of the duty cast upon the Ryde Commissioners to repair their streets. Whether that case is quite consistent with the principles upon which cases of the class now before your Lordships have been decided or not it is immaterial to discuss. The language of the statute was different and the ground of the decision was that a new and peculiar right had

(1) 2 T. R. 667. (2) 8 Ex. 319; 9 Ex. 609. (3) 4 B. & S. 361.

been created. No such question to my mind arises here. With the exception to which I have last alluded, the principle has been maintained for certainly more than a century, and I am of opinion that in this case no ground has been put forward on which the long current of authorities should be disturbed.

I therefore move your Lordships that this appeal should be dismissed.

LORD HERSCHELL:—

My Lords, the question which arises in this action is whether the defendants are liable in respect of an accident which happened to the plaintiff, owing to the existence of a drop of eighteen inches in the level of a footway vested in the defendants, in consequence of which the plaintiff fell and sustained considerable injury. The difference of level in the footway arose from a carriageway having been made for the purpose of access to Captain Machell's stable, the yard of which adjoined the footway. This work was executed by Captain Machell in the year 1873. The plaintiff in his statement of claim asserted that the defendants had wrongfully suffered and permitted the footway to be out of repair and in a condition dangerous to passengers. It appeared clearly at the trial that there had been no misfeasance on the part of the defendants. The utmost that could be charged against them was non-feasance. It was strongly urged at the bar that the highway including the footway being vested in the defendants, they were responsible if it was not kept in proper condition and repair to any one who was injured by reason of its not being so kept. In support of their contention they relied mainly on the 144th and 149th sections of the Public Health Act 1875. By the former of those sections every urban authority is to execute the office of surveyor of highways, and to exercise and be subject to all the powers, duties, and liabilities of surveyors. By the latter it is provided that the urban sanitary authority shall from time to time cause all streets vested in them to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require. Amongst the duties thus imposed upon the urban authority was undoubtedly the duty of keeping this highway in repair, and it is said that any person injured by the non-

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performance of a statutory duty is entitled to recover against the person on whom that duty rests. I entertain very grave doubts whether the proposition thus broadly stated can be maintained. The principal authority in support of it is the decision of the Court of Queen's Bench in the case of *Couch* v. *Steel* (1). But in the case of *Atkinson* v. *Newcastle Waterworks Company* (2) the late Lord Cairns and Cockburn C.J. and the present Master of the Rolls all expressed serious doubts whether the case of *Couch* v. *Steel* (1) was rightly decided, and whether the broad general proposition could be supported, that whenever a statutory duty is created any person who can shew he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. I share the doubt expressed by these learned judges and the opinion expressed by Lord Cairns that much must "depend on the purview of the Legislature in the particular statute and the language which they have there employed." In the case of *Glossop* v. *Heston and Isleworth Local Board* (3) James L.J. made some observations bearing on this point, which seem to me to be of great weight. In that case the plaintiff claimed an injunction to restrain a nuisance on the ground that the defendants had neglected to perform the statutory duty cast on them as the sanitary authority of a particular district. The learned Lord Justice said: "It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon whom duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not, in a similar manner, be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would have been very much improved." And he expressed the opinion that such a contention was not supported either by principle or authority. It is to be observed that the Highway Act, which defines the duties of surveyors of highways, prescribes the mode of proceeding when the duty of repairing the highway is unfulfilled and the liability

(1) 3 E. & B. 402. (2) 2 Ex. D. 441.
(3) 12 Ch. D. 102, 109.

which is then to attach to the surveyor. By sect. 94 he may be summoned before the justices, and if it appears either upon the report of a person appointed by them to view, or on their own view, that the highway is not in a state of thorough and perfect repair, they are to convict the surveyor in a penalty, and to make an order on the surveyor to repair it within a limited time; and if the repairs are not made within the time so limited the surveyor is to forfeit and pay to a person to be named and appointed in a second order a sum of money equal to the cost of repairing the highway. I think it, to say the least, doubtful whether, apart from the reasons to which I am about to refer, the contention that an action lies against the local board for a breach of their statutory duty to repair the highways can be maintained.

It was held as long ago as the case of *Russell* v. *The Men of Devon* (1), that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. This decision was no doubt largely, but it was not exclusively, founded on the fact that the inhabitants of the county are not a corporation, and cannot be sued collectively. In the subsequent action of *McKinnon* v. *Penson* (2) brought against the county in the name of their surveyor for a similar cause, it was urged that the 43 Geo. 3 c. 59 s. 4, which enacted that the county might be sued in the name of their surveyor, had removed the only difficulty in the way of the plaintiff. It was held, however, that the effect of the statute was not to create a new liability, but only a more convenient method of enforcing existing rights. And in *Young* v. *Davis* (3) it was held in the Exchequer Chamber that a surveyor of highways was not liable to an action for injuries resulting from the breach of his duty to keep the highways in repair. It was argued in *Gibson* v. *Mayor of Preston* (4) that the Public Health Act 1848 did something more than impose upon the corporation the duties and subject them to the liabilities of surveyors of highways, and that under the provisions of that statute they were liable to a person suffering through the non-repair of a highway. The Queen's Bench, however, in a considered judgment rejected this argument, and held that the

(1) 2 T. R. 667.
(2) 8 Ex. 319; 9 Ex. 609.
(3) 2 H. & C. 197.
(4) Law Rep. 5 Q. B. 218.

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defendants were not liable. The provisions of the Public Health Act 1875, on which the appellant now relies, are precisely similar to those upon which the judgment in *Gibson* v. *Mayor of Preston* (1) proceeded. Your Lordships are asked to overrule that decision. I am not prepared to do so. The Legislature in 1875 re-enacted unaltered the provisions upon which this construction had been placed, and I cannot think that it was intended by the Legislature to impose the liability now contended for. The only case which can be relied on as affording any support to the appellant's contention is *Hartnall* v. *Ryde Commissioners* (2). But the legislation on which that case turned was not precisely the same, and the arguments which were so carefully considered and which prevailed in *Gibson* v. *Mayor of Preston* (1) do not appear to have been insisted upon. For it appears to be assumed in the judgment that if the defendants were liable to be indicted for the non-repair of the highway as for a misdemeanour, an action would lie by any one specially aggrieved. No reasons are given for this conclusion, which seems to have been treated as a necessary consequence. I think the judgment appealed from ought to be affirmed.

LORD HANNEN :—

My Lords, the plaintiff in his statement of claim alleges that the defendants (the Newmarket Local Board) negligently built and placed and suffered to remain on the footway of a road under their care, management, and control, a brick wall and a declivity formed thereby without any guard or light, whereby the plaintiff while walking along the said footway after daylight had ceased fell down the declivity and sustained injury.

The wall and declivity complained of were not constructed by the defendants, but were made many years ago by the owner of premises adjoining the footway for the convenient access of his horses from the road to his stables. This was done without the leave of the local authority. The only act done by the defendants in connection with this footway is that they have gravelled a portion of it in recent years. This was a proper thing in itself and had nothing to do with the accident complained of.

The question, therefore, is reduced to this, whether the defen-

(1) Law Rep. 5 Q. B. 218. (2) 4 B. & S. 361.

dants in whom the powers and liabilities of surveyors of highways are vested by statute have thereby imposed upon them a liability to be sued for a cause of action which could not have been maintained against the surveyor of highways. This is a subject which has engaged the attention of the Courts on many occasions. The governing principle was stated in the Exchequer Chamber as long ago as 1863 in the case of *Young* v. *Davis* (1), that the surveyor of highways was not liable to be sued for damage resulting from the highway being out of repair because no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled.

This principle is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson* v. *Mayor of Preston* (2), where the previous authorities were considered; and, unless this House is prepared to overrule that case, it governs the present. After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson* v. *Mayor of Preston* (2), and I therefore think that the judgment appealed from should be affirmed.

LORD MACNAGHTEN:—

My Lords, I concur, and have nothing to add.

Judgments appealed from affirmed and appeal dismissed.

Lords' Journals 9th August 1892.

Solicitor for appellant: *F. D. Simpson, for W. I. Hawken, Manchester.*

Solicitors for respondents: *Purkis & Co., for James Button, Newmarket.*

(1) 7 H. & N. 760; 2 H. & C. 198. (2) Law Rep. 5 Q. B. 218.

[HOUSE OF LORDS.]

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LORD HENRY BRUCE, LORD ROBERT BRUCE, LORD FREDERICK BRUCE AND OTHERS (INFANTS) . . . . . } APPELLANTS;

AND

THE MARQUESS OF AILESBURY AND G. B. LAURENCE . . . . . } RESPONDENTS.

Settled Estate—Mansion House—Sale—Tenant for Life—Consent of Court—Remaindermen opposing Sale—Tenants on Estate—Discretion of Court to allow Sale—Settled Land Act 1882 (45 *&* 46 *Vict. c.* 38) *ss.* 3, 15, 50, 51, 53—*Settled Land Act* 1890 (53 *&* 54 *Vict. c.* 69) *s.* 10 *sub-s.* 2.

In the Settled Land Acts 1882 and 1890 the paramount object of the Legislature was the well-being of settled land.

An estate including an old family mansion-house became vested under a settlement in a tenant for life, a young man who had mortgaged his life estate to a money-lender who had brought an action for foreclosure. The tenant for life who was too poor to reside on the estate had contracted under the Settled Land Acts to sell the whole for a good price to a wealthy purchaser, and petitioned under s. 10 of the Settled Land Act 1890 for the sanction of the Court to the sale of the mansion-house and demesne lands. The remaindermen opposed the petition, desiring that the mansion-house and demesne lands should remain in the family:—

Held, affirming the decision of the Court of Appeal ([1892] 1 Ch. 506), that the Court in the exercise of its discretion under the Settled Land Acts must have regard to the well-being of the land and the interests of the persons from whose industrial occupation the rents and profits were derived, as well as to the interests of those entitled under the settlement; and that to refuse the sanction in such a case would be to defeat the object of the Legislature.

APPEAL from an order of the Court of Appeal reversing a decision of Stirling J. The circumstances and the arguments in both Courts are set out at length in the report of the decisions below (1). The following outline is enough for the present purpose:—

Under a settlement of July 1885 the Marquis of Ailesbury became in 1886 tenant for life in possession of the Savernake estate, without impeachment of waste, with remainder to his first

(1) [1892] 1 Ch. 506.

and other sons in tail male, with remainder to his uncles Lord Henry, Lord Robert, Lord Frederick and Lord Charles Bruce successively for life and their first and other sons successively in tail male, with ultimate remainder to the Marquis in fee. The Marquis who was born in 1863 was married in 1884 but had no issue.

The Savernake estate comprised a mansion-house and about 40,000 acres of which about 7700 consisted of pleasure grounds, park and lands usually occupied with the mansion-house, including Savernake Forest. The other lands were chiefly arable, down, and pasture farms, with timber of considerable value, many cottages, and some house property in Marlborough. The net yearly income of the whole, after payment of outgoings, jointures, and interest on mortgages, was about £900, and rents were falling. The life interest of the Marquis was mortgaged for £212,000: the mortgagee had brought an action for foreclosure: and a receiving order had been made. The mansion-house and lands usually occupied therewith were very costly to keep up.

In June 1891 the Marquis entered into contracts with Lord Iveagh (a wealthy man) under the Settled Land Acts 1882 to 1890 to sell to him the fee-simple of the whole estate for £750,000, £500,000 of the purchase-money to be left upon mortgage for five years at 4 per cent., the agreement being conditional upon an order of the Court being obtained to authorize the sale of the mansion-house, pleasure grounds, park, and lands usually occupied therewith, as required by sect. 10 of the Settled Land Act 1890. The Marquis then presented a petition under the Settled Land Acts praying the sanction of the Court to the sale of the mansion-house, pleasure grounds &c. and to the arrangement for the £500,000 to be left on mortgage. The consent of the trustees of the settlement could not be obtained to the sale, one being adverse. The petition was opposed by Lord Henry Bruce, the heir-presumptive to the Marquisate, and by Lord Robert and Lord Frederick, for several reasons, of which those material to the present report were that Savernake was now the only residence of the Ailesbury family, had been their principal residence since 1675, and was of great value and of historical and exceptional interest, comprising as it

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did the beautiful and unique Savernake Forest. There was evidence that the price, £750,000, was an extremely good one: much better than could be again expected: and that without the mansion-house, pleasure grounds, park and lands usually occupied therewith the estate could not be sold so advantageously. If the sale were carried out the income of the Marquis and after his death of the remaindermen would be considerably increased.

Stirling J. made an order dismissing the petition. The Court of Appeal (Lindley, Bowen and Fry L.JJ.) discharged that order and made an order that the Marquis be at liberty to sell the mansion-house with the pleasure grounds, park and lands usually occupied therewith, and the other lands comprised in the agreement, in accordance with the terms of the contracts and that the contracts be confirmed (1).

Aug. 1. Sir *H. Davey* Q.C. and *Buckley* Q.C. (*G. Henderson* with them) for the appellants:—

The error is in considering matters outside the statute. The object of the Settled Land Acts was to increase the marketable quality of land: and to enable settled lands to be sold for the benefit of all interested in the settlement: the Acts say nothing about tenants or the cultivation of the land or the welfare of the cottagers: the only parties to be considered by the Court are those interested in the settlement, and the Court should act as prudent trustees would. The tenant for life is put in the position of a trustee: he must exercise a discretion, and as enacted by sect. 53 of the Act of 1882 "have regard to the interests of all parties entitled under the settlement," including the interests of sentiment and attachment to the family place. As the trustees will not consent, he must satisfy the Court of the propriety of the sale and that he has had regard to the interests of the remaindermen. Those interests he has admittedly disregarded. Surely something more is meant to be secured than that the tenant for life shall have a good price which will make his income larger and his circumstances more comfortable. The Court must look beyond the mere pecuniary, commercial question, and must regard the position in the country of the head of a great house,

(1) [1892] 1 Ch. 506.

largely dependent on ancestral estates. A mansion-house is not usually regarded as an element of profit. If (as is urged) the Acts were passed with a view to the improvement of estates, then let the estate be sold but the mansion-house &c. spared. That and the residential lands might be let advantageously. The remaindermen desire to retrieve the family fortunes: the next Marquis may succeed in doing so: why should all possibility of their regaining their ancient position in the county be for ever cut off?

[They also referred to heirlooms, sect. 37 of the Settled Land Act of 1882; *In re Earl of Radnor's Will Trusts* (1); sect. 10 of the Settled Land Act of 1890; and the Settled Estates Acts 1856, 1858, 1864, 1874, and 1877.]

Rigby, Q.C. and *Fossett Lock* for the Marquis of Ailesbury; and Sir *H. James* Q.C. and *Muir Mackenzie* for the other respondent—one of the trustees—were not heard.

The House took time for consideration.

1892. Aug. 9. LORD HALSBURY L.C.:—

My Lords, in this case your Lordships are called upon to consider the exercise of the discretion which has been vested in the Court by the Settled Land Act of 1890, sect. 10, sub-sect. 2, which is in these words: "(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court." Sect. 3 sub-sect. 1 of the Act of 1882, of which the sub-section I have just recited is an amendment, but which adds nothing which is relevant to any dispute between the parties here, gives an absolute power to the tenant for life to sell the settled land.

By sect. 53 of the Act of 1882 it was enacted that a tenant for life in exercising any power under the Act should have regard to the interests of all parties entitled under the settlement, and

(1) 45 Ch. D. 402, 416.

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should in relation to the exercise thereof by him be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Of the 40,000 acres of which the estate now in question consists, it cannot be denied that the tenant for life has in respect of 33,000 of them at all events an absolute right to sell; that has not been and could not be disputed. The question arises under the restriction as to the mansion-house and the lands, pleasure grounds and park usually occupied therewith. It scarcely requires argument to shew that if the commercial interest is alone to be considered the withdrawing from the sale of the mansion-house and the pleasure grounds usually occupied therewith, in this particular case, would have a very serious depreciatory effect upon the sale of the remainder. The 7000 acres by themselves, or the odd 33,000 acres by themselves, certainly would not be likely to realise, if sold separately, the gross sum which would be obtained by selling both as one estate. But the question your Lordships have to determine is whether, under the circumstances of this particular case, consent should be given to the sale of the whole.

It cannot be denied that the tenant for life is not in a position to do that which may be compendiously described as "keeping up the estate." If capital expenditure, either for repairs or otherwise, is required he cannot supply it. The estate during the period of his life (and he is still a young man) must pass into the hands of his creditors, whose interest in it would be confined to realising their security. I say nothing of his own wishes, I say nothing of his own conduct. I simply refer to the dry facts, which render it to my mind a matter of absolute certainty, that if the estate is to be continued as vested in him, neither improvement, repair, nor profitable occupation, either to the estate or to the individual, is likely to result from a continuance of the estate in its present encumbered condition.

Under these circumstances the tenant for life has consented to sell, and an offer has been made for the estate, as to which it has hardly been seriously contended that it is not a good and even advantageous offer, though not perhaps, as Sir Horace Davey

said, an extraordinarily lavish one. The trustees of the settlement have not in this case consented, but are divided in opinion, and the Court therefore has to determine whether upon the facts of this case, the consent ought or ought not to be withheld.

Now the Act of Parliament itself contains, either by way of recital or preamble, nothing to shew what the meaning or policy of the statute was; but the power given for the tenant for life to sell notwithstanding that, by the terms of the settlement, his powers did not extend beyond his own life, seems to me (apart from every extraneous consideration) enough to shew that what the statute intended to do was to release the land from the fetters of the settlement—to render it a marketable article notwithstanding the settlement. And historically, one knows very well what were the objections made to the law of settlement in its effect upon the cultivation and useful occupation of land.

Now, it has been a very familiar canon of construction to contemplate what was the cause and reason of the Act, or, in other words, the mischief requiring a remedy. Thus in *Heydon's Case* (1) the common law was that religious and ecclesiastical persons might have made leases for as many years as they pleased. It has been said that the mischief was that when they perceived their houses would be dissolved they made long and unreasonable leases, and it was in that case the Barons of the Exchequer resolved among other considerations for the construction of statutes, that it should be considered what was the mischief and defect against which the common law did not provide, and what was the remedy which Parliament hath resolved and appointed to cure the disease of the Commonwealth.

I can contemplate many cases where it would be the duty of the trustees to withhold their consent. Questions, however, arise on which I am reluctant to enter, since I might be impliedly expressing opinions upon the mode in which the discretion should be exercised in cases which are not now before me.

I prefer to say that in this case there is every circumstance

(1) 3 Rep. 7 b, 8 a.

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which should induce the Court to give its assent. The tenant for life is young. No one of the persons who appear in opposition to the petition may ever have any interest in the property; and in the meantime the property, to whomsoever it may ultimately belong, would almost certainly be deteriorated in value in proportion as the status quo continues.

Whether or not what have been called "the sentimental considerations" are legitimate subjects of consideration or not it is not necessary to determine, since it is manifest from the whole structure of the Act—and, indeed, from the very circumstance that no limit is laid down to the discretion—that the Legislature contemplated consent being given by the Court notwithstanding any opposition by those who might be next in remainder.

It was said that such a construction of the discretion would be to assume a very strong act of the Legislature; but it is only necessary to reply that the very fact of setting aside the determination of the settlement that particular land should go to particular persons designated or capable of being afterwards ascertained is as strong an act of the Legislature as it is possible to conceive, and certainly in respect of the land not within the protection of the excepted portion that has undoubtedly been done.

I notice that some of the judges have used the phrase that this statute is not an Incumbered Estates Act. I think it would be more accurate to say that it is not *solely* an Incumbered Estates Act; but for myself I am prepared to say that it was in many respects analogous to, and had in part the same objects as, the Acts that are so described.

It would, of course, be an inefficient and therefore an inaccurate description of this Act to speak of it as an Incumbered Estates Act; but, nevertheless, by whatever name it is known, I think it undoubtedly did contemplate that an incumbered proprietor who was a limited owner was unable to fulfil the duties of proprietorship, and that it was not for the good of the State that the incumbered proprietor should be compelled to continue in a position in which he could do no good either to himself or anybody else.

The Royal Commission on Agriculture disclosed in more than one part of the evidence the evils incident to such a condition of things, and the only difficulty I have had in commenting on the judgments of the Court of Appeal is, that I think their Lordships have been misunderstood in treating the evidence which shewed the injury to the estate rather as if that evidence was itself the mischief against which the Act was directed, and not the injury to the estate which I believe is the key to the enactments of the statute.

The provisions as to heirlooms, I think, raise very different considerations. I am not certain that any public considerations intervene when the question of the sale of heirlooms arises. It is enough, however, to say that public considerations here do very largely enter into the policy of the particular provisions in the Act with which your Lordships are now dealing.

My Lords, under these circumstances, I cannot doubt that the appeal should be dismissed, and the order of the Court of Appeal affirmed, and I move your Lordships accordingly.

Lord Hobhouse, who is unable to attend, requests me to state that he desires to concur in the judgment.

LORD WATSON :—

My Lords, this case would have presented a different aspect if the Settled Land Acts 1882 to 1890 had merely been intended to regulate the respective interests of tenants for life and remaindermen. But the whole tenor of their provisions, as well as the title of the principal Act, indicate that the leading purpose of the Legislature was to prevent the decay of agricultural and other interests occasioned by the deterioration of lands and buildings in the possession of impecunious life-tenants.

In exercising the discretion committed to it by sect. 10, subsect. 2 of the Act of 1890, I venture to doubt whether the Court can derive much assistance from the provisions of sect. 53 of the Act of 1882. These prescribe the duty which the life tenant owes to his remaindermen, in cases where he has actually got power to sell at his own hand. But, in cases like the present,

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the Court has to determine whether he is to have any power to sell—a question which, in my opinion, involves other considerations than those arising from the relative positions of the parties having proprietary interests, present and expectant, in the estate. In solving that question, I think the Court is bound to take into consideration not only the relative interests of those parties, but the interests of the estate itself, including in that expression the well-being of the persons from whose industrial occupation its rents and profits are derived.

Upon the facts of the case I can add nothing to what has been said by the learned judges of the Court of Appeal. To refuse consent to a sale of the mansion-house in such circumstances would, in my opinion, be to defeat the main object of the statutes.

My noble and learned friend, Lord Herschell, who has been obliged to leave the House, requested me to state that he entirely concurs in the judgment proposed.

Lord Macnaghten:—

My Lords, in the course of the argument your Lordships were invited to turn to the Settled Estates Acts if you would ascertain the rule which ought to guide the Court in exercising the powers entrusted to it by the Settled Land Act 1882. Your Lordships, I think, would hardly be disposed to take that course. The Act of 1882 differs from all previous legislation in regard to settled land. It proceeds on different lines, and it has a different object in view. The Settled Estates Acts did not confer or enable the Court to confer on a limited owner powers beyond those ordinarily inserted in a well-drawn settlement. They were no doubt very useful Acts in their way. An application to the Court at a moderate cost was made to serve the purposes of a private estate Act. But the Settled Land Act was founded upon a broader policy and has a larger scope. A period of agricultural depression, which shewed no sign of abatement, had given rise to a popular outcry against settlements. The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce, without doing

away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act as far as it was possible to protect them. They must be duly considered by the trustees or by the Court whenever the trustees or the Court may be called upon to act. But it is evident I think that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests. Take the case of heirlooms as an illustration. The sale of heirlooms is authorized. The purchase-money becomes capital money arising under the Act, and may be dealt with accordingly. A sale of heirlooms, therefore, may seriously disturb the interests of persons entitled under the settlement. A remainderman who would have been absolute owner of heirlooms if there had been no sale may find the heirlooms sold and the purchase-money applied in paying off encumbrances or making improvements on the settled land without any special reservation in his favour. Still the Act authorizes the sale, but it entrusts the power of sanctioning the sale to the Court alone, as being, no doubt, likely to take a broader and more independent view than the trustees of the settlement. It seems to me, therefore, that the learned counsel for the appellants were not quite right in saying that the Court ought to put itself exactly in the position of the trustees and consider what prudent trustees would do. I think something more is expected of the Court. Trustees would not be to blame if they were to concentrate their attention on the interests of the persons entitled under the settlement and the wishes of the settlor. It is the duty of the Court—a duty which the Court is not at liberty to omit—also to keep in view the main purpose of the Act from which it derives its powers. This really is all that the Court of Appeal has done, and I think that it has done quite right.

I agree that the appeal must be dismissed with costs.

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LORD MORRIS:—

My Lords, I concur in the judgment which has been moved by the Lord Chancellor, and in the reasons which he has assigned for it.

LORD HANNEN:—

My Lords, I also concur.

Order appealed from affirmed and appeal dismissed with costs; cause remitted to the Chancery Division.

Lords' Journals 9th August 1892.

Solicitors for appellants: *Hunters & Haynes.*
Solicitors for respondents: *Mewburn-Walker & Laurence.*

[HOUSE OF LORDS.]

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April 5.

THE ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION . . . } APPELLANTS;

AND

KING, BROWN & CO. . . . . RESPONDENTS.

Patent—Infringement—Prior Publication—Prior Public User.

The validity of a patent for making dynamo-electric machines was challenged on the ground of prior publication, founded upon a description in the specification in an earlier patent:—

Held (affirming the decision of the Court of Session (17 Court Sess. Cas. 4th Series (Rettie, 1266)), that the question whether the specification of the earlier patent was sufficient to disclose the invention to the public did not turn upon the sufficiency or insufficiency of the specification for the guidance of a skilled workman, for the patent might be void for incomplete directions to a workman of ordinary skill, and yet sufficient to inform the public of the invention; but that the proper test was whether, the description in the specification was sufficient to convey to men of science and employers of labour, information which would enable them to understand the invention, and give a workman specific directions for the making of the machine; and that, applying such test, there had been prior publication.

APPEAL against an interlocutor of the First Division of the Court of Session, Scotland, which affirmed an interlocutor of the Lord Ordinary, setting aside the patent 2003 of 1878, of which the Anglo-American Brush Electric Light Corporation, Limited, were assignees (1). The action was brought in Scotland by King, Brown & Co., the respondents, electrical engineers, Edinburgh, against the appellants,—who had threatened the respondents and their customers with legal proceedings in respect of an alleged infringement of the appellants' series-shunt winding machine (2) for the generation and application of electricity to lighting, plating, and other purposes,—for the reduction as invalid of the appellants' letters patent.

(1) 17 Court Sess. Cas. 4th Series (Rettie), 1266; 6 P. O. R. 414.

(2) About 1878 the use of the incandescent light caused a demand for series-shunt winding machines as securing a "constant potential" or continuous current.

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The facts and the material part of Varley's specification sufficiently appear from the judgments; and it is only necessary to add that the respondents contended in the Court of Session that the patent was invalid on several grounds, including the discrepancy between the invention claimed after amendment and that claimed before amendment; but the only questions argued at the bar were whether, first, there had been prior publication; and, secondly, prior public use. The prior publications relied on were Samuel Alfred Varley's specification 4905 of 1876; Clark's specification 4311 of 1875; A Communication to the Royal Society, 14th of February, 1867, by Charles Wheatstone; the chief being Varley's specification. The prior public use was the use of Varley's machine at the manufacturers, Siebe & Gorman; but the evidence only established two occasions of public use—once to illuminate certain operations in a diving-tank, and on another occasion to produce a light for photographing an ice-machine. Afterwards the machine appears to have been thrown aside, and remained until this action was commenced at Messrs. Siebe & Gorman's. Their Lordships, who examined Varley's machine as well as an early drawing of it by him, decided that it was undoubtedly a series-shunt winding machine.

On appeal,

1891. Dec. 1, 3, 4, 7. Sir *R. E. Webster*, A.G., and *Moulton*, Q.C. (with them, *J. C. Graham*), for the appellants :—

On the construction of Varley's specification they contended it was not a disclosure to the public of the appellants' patent.

As to prior public use, they submitted that Varley's machine never was a developed nor completely used machine; that its trials never got beyond what might be called the purely experimental stage; that there had not been user which added something to the common knowledge; that the machine had been abandoned and thrown aside; and that if the case was to be decided on prior public user alone, such use of Varley's machine as had been proved could not be held to be such a prior public use as would in law invalidate the appellants' invention.

[They cited, on the question of prior publication, *Bailey* v.

Roberton (1); *Hills* v. *Evans* (2); *Neilson* v. *Betts* (3); *Hills* v. *London Gaslight Company* (4); *Plimpton* v. *Malcolmson* (5). Upon the question of prior or experimental use: *Jones* v. *Pearce* (6); *Galloway* v. *Bleaden* (7); *In re Newall & Elliot* (8); *Hancock* v. *Somervell* (9); *Edison & Swan Electric Light Company* v. *Holland* (10).]

The *Solicitor-General for Scotland* (*A. Graham Murray*, Q.C.), and Dr. *Alfred Daniell* (of the Scotch Bar), for the respondents, were not called upon.

Judgment after consideration.

LORD HALSBURY, L.C.:—

My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session affirming the interlocutor of the Lord Ordinary, setting aside the patent, of which the appellants are the assignees, on the ground that the portion of the invention patented (with which, under the circumstances, it is alone material to deal) had been previously published.

The patent so set aside is known as Brush's patent, and bears date the 16th of November, 1878, and the question in debate is whether a patent taken out by Mr. Samuel Alfred Varley in 1876 does or does not so anticipate the patent of 1878, of which the appellants are the assignees, as to make the latter patent bad.

The patent has relation to the particular form of dynamo-electric machines, all of which have, and were known to have before the date of either patent, this principle in common, that they move magnets past coils of wire or coils past magnets with sufficient velocity to produce the desired result.

It was also familiar knowledge before the date of either patent, that a current of electricity sent round a bar of soft iron would render the bar of iron magnetic.

Undoubtedly the progress of electrical science has given rise

(1) 3 App. Cas. 1055.
(2) 31 L. J. (Ch.) 457, at p. 462; 4 D. F. & J. 288.
(3) Law Rep. 5 E. & I. at p. 15.
(4) 5 H. & N. 312, at p. 366.
(5) 3 Ch. D. 531.
(6) 1 W. P. C. 122.
(7) 1 W. P. C. 521, at p. 526.
(8) 4 C. B. (N.S.) at pp. 276, 294.
(9) 39 Newton's L. J. 158; Johnson's Pat. Man. (4th ed.) 42.
(10) 6 P. O. R. at pp. 277, 283.

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to various forms of using that energy in which the two principles to which I have adverted have become important, and the practical application of them by means of different mechanical devices has for some time past exercised the ingenuity of practical electricians.

One appears to have been the idea of making one wire go round the iron bar, make it and maintain it as a magnet, making the same wire go to perform whatever work it was intended to perform, and returning to the magnet, and thus the single current doing two things.

The further step was made when what was called the shunt apparatus was invented. The current of electricity was divided into two. One stream, so to speak, was made to go round the iron bar, keeping it magnetic, while the other was led to do the work which it was required to do, and were rejoined after the work had been accomplished.

Mr. Imray explains with great clearness what are the two principles called Series and Shunt-winding.

On the machine being revolved, he says, a wire wrapped round and round the magnet crosses over to another magnet, proceeds to do whatever work is required of it in what is called the external or working circuit, and goes back again after doing the work.

It is called "Series" winding, because the coils of the electro-magnet are in series with the external circuit—that is to say, it is one continuous wire. The current goes straight from start to finish. The whole electricity produced by the machine goes to excite the magnet *and* to the external wire, and straight from the one to the other.

The weak point of it (said Mr. Imray) is this: that as soon as you break the external circuit you will cease to have an electric machine, because there is no current. In electrical language, that is spoken of as having the external circuit opened. When the external circuit is broken or opened, the current ceases to flow, and you do not have the advantage of any magnetising action by the current going around the magnets of the machine.

In the same way, the more resistance you put in your external circuit—that is to say, the more work you ask your machine to do

—the less current will flow through the external circuit; and the more work you have the less you will be doing towards the magnetising of your machine. Resistance in wire mainly depends: first, upon the character of the wire and what metal it consists of; secondly, upon its transverse section; and, thirdly, upon its length. The longer the wire the greater the resistance; the smaller the section the greater the resistance; one kind of metal has more resistance than another. Roughly speaking, a short thick wire has much less resistance than a long thin one.

Another form is what is called "Shunt" winding, in which the difference is simply in the disposition of the wires. The current coming away is split into two. One portion of it goes to what has been called the external circuit, doing whatever is to be done, and having done that work returns to the machine, but without any actual contact with the magnets of the machine at all. The other portion goes straight to the magnet, is wrapped round it as before, and then returns to the brush, as it is called, without any contact with the external circuit at all.

The strong point (says Mr. Imray) of this arrangement is that, whether the external circuit is open or closed, there is always magnetism in the wire capable of producing electricity, because the current is continually running through the shunt to the magnet. A defect in it is that some of the electricity is taken away from the external circuit which otherwise would go through it.

One further explanation of Mr. Imray's becomes necessary to follow the question with which your Lordships have to deal, and that has reference to what Mr. Imray says is variously known as "electro-motive force," "tension," "pressure," and "potential."

"Potential" seems to be the word generally used, and means the intensity of pressure by which the electricity is caused to pass along a conductor.

The advantage of what is called a compound winding, which is neither more nor less than a combination of the two previously described, the first being known as "Series," the second as "Shunt," and the one in debate as "Series-Shunt," or compound winding.

The advantage of the arrangement is in producing a constant

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pressure, or an equal volume, or an even current. It is difficult, except by finding analogies in other subjects of physical research than electricity, to convey the exact idea; but the advantage attained at all events is, that when the work is changed in the outer circuit the amount of current that goes round the magnet is so changed that one compensates, or nearly compensates, for the other.

Now in the patent patented in 1876, Mr. Varley says:—

"Part of the electricity developed by the machine is *diverted*" (and the word is significant) "to maintain the magnetism of the soft iron magnets, and the remaining portion is used to produce the electric light. There are several well-known ways of doing this" (this has been the subject of very violent comment); "but the method I prefer is to wrap the soft iron magnets with two insulated wires, one having a *larger* resistance than the other. The circuit of larger resistance is always closed, and the circuit of *less* resistance used for the electric light.

"When the electric light is being produced, the greater portion of electricity passes through the circuit of less resistance, which I term 'the electric light circuit,' maintaining the magnetism of the magnets and producing the light. When the electric light circuit is opened from any cause, the electricity developed passes through the circuit of greater resistance only, and maintains the magnetism of the magnets."

It is impossible to deny that in the present state of electrical knowledge dealing with dynamos; that the description given undoubtedly does disclose to anybody familiar with the principle of electro-dynamos and the medium by which the electric current is turned to account, the very thing for which the patent was granted to Mr. Brush.

But it is said that, for the purpose of judging of the novelty of the invention of 1876, one must, as nearly as one can, apply oneself to the knowledge existing at that date, and not apply what we have learned since, so as to interpret the language of the patent of 1876 by the light of later discoveries.

I am not quite certain that I understand the application to this case of that principle of interpretation, which, however, I admit to be sound. The "Series" was known, the "Shunt"

was known, and the language seems to me incapable of any other interpretation than that the patentee did mean to combine the two previously known systems. If he did, and disclosed the mode of doing it, the novelty of the later patent cannot be supported.

I confess that I am unable to entertain a doubt that it was so disclosed. What he intended was, I think, conclusively shewn by the original rough sketch produced. Distinguished electricians cavil at the mode of its disclosure, criticise the language (which is not, perhaps, the most felicitously chosen), and possibly suggest doubts as to what would have been the fate of Mr. Varley's patent if it had been attacked upon the ground of the insufficiency of the specification; but that is not the question to be determined here.

The question is the disclosure of the invention, which consisted in the combination of two known forms of dynamo-electric machines.

I doubt whether there is much to choose in clearness of exposition between the one patent and the other. I think it is certain that neither the one patentee nor the other had any very definite notion of the importance of the invention until a year or two later.

The invention of the Incandescent light brought into prominence the importance of an even, uniform, and continuous flow of the electric energy.

I am, therefore, of opinion that the interlocutor appealed from ought to be affirmed.

I have confined myself, however, in arriving at this conclusion, to the specifications themselves, aided by scientific witnesses, in interpreting the scientific nomenclature in which the specifications are couched, and the explanations of the witnesses as to the operations produced by the different forms adopted.

I designedly avoid giving any opinion upon the question of the user of Varley's machine. Many questions, to my mind, arise as to what publication there was from the use of that machine as a machine disclosing the mode by which the electric light was produced. But inasmuch as I have come to the conclusion that I have indicated, it is not necessary further to

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discuss the extent to which the use of the electric light by means of Varley's machine for the purpose of illustrating some submarine invention was such an exhibition or publication of it as would make a subsequent patent void.

I therefore move your Lordships, that the interlocutor appealed from be affirmed, and this appeal dismissed with costs.

LORD WATSON:—

My Lords, The appellants are assignees of Brush's patent of 1878, for improvements in apparatus for the generation and application of electricity for lighting, plating, and other purposes. The patent originally included two different dynamo-electric apparatus, now known respectively as the shunt and the series-shunt; but, in 1882, the appellants, having become aware of the fact that their shunt-winding machine had already been fully described and claimed in Clark's patent of 1875, amended their specification by disclaiming that part of it which related to shunt-winding, and limiting their claim to the series-shunt.

In this appeal, they complain of a decision of the First Division of the Court of Session, affirming an interlocutor of the Lord Ordinary (Trayner), by which he reduced and set aside their letters patent as amended by disclaimer, on the grounds, inter alia, that the series-shunt apparatus therein described had been published in Varley's patent of 1876, and also that there had been prior public user.

Dynamo-electric machines are useful for various kinds of work, but are now chiefly employed for producing light. I shall, in so far as it may be necessary to describe such machines, refer to them as if they were used for the latter purpose.

At the date of Clark's patent, the only known variety of self-exciting dynamos was the series-winding apparatus in which the current of electricity generated in the revolving coils, after it has passed through the commutator, is conducted to and round the magnets, and thence to the lamps, from which it returns to the machine, thus forming a single electric circuit, which performs the double function of magnetising the magnets and doing work. In the shunt apparatus, the volume of electricity, after it

has passed the commutator, is divided into two unequal currents by means of a shunt, or bifurcation of the conducting wire, which is in itself a common device. The smaller current is then made to circulate round the magnets, whilst the larger is led to the lamps; and they are again united just before they re-enter the machine. So that these currents form two separate circuits, that of greater resistance maintaining the supply of electric force in the magnets, and that of lesser resistance producing light.

The series-shunt-winding apparatus is, as its name imports, a combination of the two systems already described. Its arrangements are practically the same with those of the shunt-winding machine, subject to this modification, that, after bifurcation, the larger current, instead of being taken direct to the lamps, is, in the first instance, made to encircle the magnets. Accordingly, the smaller current serves for excitation only, as in the shunt system; whereas the larger current serves both for excitation and for work, as in the series-winding system.

Whether the series-shunt system was first disclosed to the public by Varley in 1876, or by Brush in 1878, it seems to be certain that the real merit of the arrangement was neither understood nor appreciated until the subsequent discovery of the incandescent lamp. The efficiency of light produced by the incandescence of filaments of carbon depends upon the maintenance of a uniform and steady flow of electricity in the working circuit, which is now termed a constant potential. In the series, and also in the shunt system, the working current is liable to considerable variation; with this difference, that the same disturbing elements which in the one case cause a decrease, in the other occasion an increase of electro-motive force. The combination of these opposite tendencies brings into play the principle of compensation, and makes it possible, by careful adjustment, to attain a more constant potential with the series-shunt than with either of its component systems.

The terms of Brush's specification indicate that the patentee had not in his view the attainment of that high degree of constancy in the motive force which is desirable for the purpose of incandescent lighting. He points out that other machines were

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"not well adapted for certain kinds of work, notably that of electroplating," and then proceeds to describe his own in these terms: "I attain my object by diverting from external work a portion of the current of the machine, and using it either alone or in connection with the rest of the current for working the field magnets. I prefer the latter plan of the two, especially for electroplating machines." In other words, he attains his object by using either the shunt or the series-shunt, but prefers the latter for electroplating. For other purposes than electroplating, he does not suggest that the one system is in any respect greatly preferable to the other. As matter of fact, it appears to be doubtful which of the two is most suitable for plating. Mr. Preece, one of the appellants' skilled witnesses, says: "Pure shunt is preferred in England for electro-plating. In America the compound is preferred."

In Varley's patent of 1876 no claim is made either for shunt or for series winding. The passage which has been held by both Courts below to anticipate the invention claimed by the appellants, is merely descriptive of the machines to which the arrangements claimed by Varley may be usefully applied, and is in these terms. [His Lordship read the portion given above in Lord Halsbury's opinion (1).]

In estimating the real significance of Varley's specification, it is necessary to consider what amount of information with respect to dynamo-electric apparatus ought to be attributed to persons who had an opportunity of reading it in the year 1876. The language used by the patentee must be construed with reference to the information then open to the public, and not in the light of subsequent discoveries. To my apprehension, it does not admit of doubt that a reader acquainted only with series-winding might not attach the same meaning to the words used by Varley as would naturally occur to one who was also familiar with the shunt, or with the shunt and series-shunt systems of winding.

Since the hearing of this appeal, I have carefully perused the whole evidence adduced by both parties, in so far as it has any bearing upon the issue of prior publication. Of the respondents' evidence it is sufficient to say that it is in entire accordance

(1) Ante, p. 372.

with the decision appealed from. The appellants' evidence consists of oral testimony by electricians of great eminence, and is directed mainly if not wholly to prove (1.) that, on a fair construction of the specification of 1876, the words relied on by the Court of Session do not disclose either shunt or series-shunt winding, and, (2.) assuming them to do so, that the specification does not contain explanations or directions which would enable a workman of ordinary skill to construct either a shunt or a series-shunt machine. I need hardly say that is for the Court, and not for the witnesses, to construe the terms of the specification; and that their evidence upon the first of these points is only material in so far as it may supply scientific facts which ought to be taken into account in arriving at the true construction of the instrument.

There is one circumstance which, in my opinion, seriously affects the value of the appellants' evidence upon both points. The testimony of their witnesses was given upon the footing that, in 1876, Clark's invention of the previous year was still unknown, and that those who read Varley's specification could have no knowledge of any system other than series-winding. Upon that assumption, it occurs to me that a reader, whether man of science or skilled workman, would probably have been at a loss to discover what Varley meant, and might not have arrived at either shunt or series-shunt winding without some exercise of his inventive faculty. I am, however, unable to find any good reason for holding that Clark's shunt machine was unknown in the year 1876. It is true that in 1878, Mr. Brush had never heard of Clark's invention, and also that shunt-winding was unknown to Sir William Thomson before 1879. But it appears to me, that Clark's taking out a patent for his invention was, both in fact and law, a publication of it. I do not suppose that every electrician, however eminent, is by necessity personally cognizant of every invention patented within the bounds of his science; and the ignorance of two or more of them is unavailing to prove that the knowledge of others was equally defective. I cannot, therefore, avoid the conclusion that, in 1876, Clark's shunt-winding machine had been disclosed to the public, and must have been known to some, if not to all

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electricians; and consequently that the controverted passage in Varley's specification ought to be construed on the footing that shunt-winding was known at its date.

I do not think it necessary to deal with the conflict of testimony as to the sufficiency of Varley's specification for the guidance of a skilled workman. The Lord Ordinary was of opinion that the appellants had failed to prove that part of their case. But I agree with his Lordship, and with the learned judges of the First Division, in holding that the sufficiency or insufficiency of the specification for that purpose does not afford a crucial test of prior publication. Every patentee, as a condition of his exclusive privilege, is bound to describe his invention in such detail as to enable a workman of ordinary skill to practise it; and the penalty of non-compliance with that condition is forfeiture of his privilege. His patent right may be invalid by reason of non-compliance; but it certainly does not follow that his invention has not been published. His specification may, notwithstanding that defect, be sufficient to convey to men of science and employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention, and to give a workman the specific directions which he failed to communicate. In that case, I cannot doubt that his invention is published as completely as if his description had been intelligible to a workman of ordinary skill.

Assuming as, in my opinion, I am bound to do, that Clark's invention was known in 1876, I have no hesitation in holding that Varley's specification sufficiently describes both the shunt and the series-shunt machine. The first sentence in the passage already quoted contains an accurate representation of shunt-winding. The electricity developed by the machine is to be "diverted," which is the word used in the appellants' specification to denote bifurcation, into two parts, one for magnetising, and the "remaining portion" for producing light. These expressions plainly refer to a single current of electricity generated by the machine, which is to be split into two currents, one for excitation of the magnets, and one for work—an arrangement which, according to the evidence, embraces all the essential

features of a shunt machine. The sentences which follow appear to me to describe the series-shunt with equal accuracy. They commence with the statement that there are several ways of "doing this"—that is, of obtaining a circuit of excitation and an electric lighting circuit from a single current by dividing it into two portions. The method preferred is to make both circuits pass round the magnets, that of greater resistance being employed for excitation only, whilst that of lesser resistance excites the magnets, and also does the work of lighting. The series-shunt is evidently treated as a mere modification of the shunt system; and I think it might be reasonably regarded in that light by the patentee. The alteration in the mechanical arrangement of the apparatus is in itself trivial; and the possibility of thereby obtaining such a constant potential as would, at a future date, suffice for the purpose of incandescent lighting was not present to his mind. There might, as one of the witnesses suggests, still remain room for a patentable improvement upon the series-shunt as described by Varley, consisting in an adjustment which would ensure a high degree of constant potential. No such possibility is indicated either by Varley or in Brush's patent of 1878.

In the argument addressed to your Lordships, counsel for the appellants laid much stress upon these words occurring in Varley's specification: "The insulated wire composing the helices is connected to the insulated wire surrounding the soft iron magnets of the machine, and is usually inserted in the circuit of greater resistance." They maintained that the necessary result of giving effect to that direction would be to deprive the apparatus contemplated by Varley of all the characteristics of series-shunt winding. The point does not appear to have been pressed in the Courts below; at least, it is not noticed by any of the Judges. In the absence of evidence to support the appellants' contention, I have come to the conclusion that the adjustment thus indicated might affect the constancy of the volume of electricity conveyed by the electric light circuit, but that the apparatus would still be a series-shunt-winding machine.

These reasons are sufficient to dispose of this appeal; and I desire to express no opinion upon the matter of prior public user.

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The argument of the appellants satisfied me that the question was one upon which I should prefer not to form any conclusion without hearing counsel for the respondents. I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL :—

My Lords, this is an appeal against interlocutors pronounced in an action of reduction brought by the respondents for the purpose of obtaining the revocation of certain letters patent then vested in the appellants. The letters patent in question bear date the 18th of May, 1878, and claim the invention of "improvements in apparatus for the generation and application of electricity for lighting, plating, and other purposes." The original specification concluded with sixteen claims, to only two of which I need now refer. The eighth claim is for what is termed in relation to dynamo-electric machinery the "shunt" system; that is to say, a dynamo-electric machine wherein a portion of the current produced is diverted for the purpose of maintaining a permanent magnetic field. The ninth claim is for what is now termed the shunt-series system or compound winding. In January, 1882, a disclaimer was filed by which the eighth claim was abandoned, it having been discovered that the shunt system was not new at the date of the letters patent. The main question, and indeed in my opinion the only question with which your Lordships need concern yourselves, is whether the shunt-series system was a new invention at that date. It is alleged by the respondents that it was not only communicated to the public by the specification of the letters patent granted to Samuel Alfred Varley in December, 1876, but that a machine was under his instructions constructed on that system, and had been in actual use before the date of the patent now vested in the appellants.

Varley's specification claimed a method of obtaining a high degree of "magnetic potential" in the bobbins of an electric machine, and the claim had no reference to the manner in which the electricity generated was to be employed; but there occurs in the course of the specification the following passage :—[His

Lordship read the portion of the specification given above in Lord Halsbury's opinion (1).]

It is scarcely denied that to any electrician possessed of the knowledge of the present day these words would convey the idea of the series-shunt system of winding. But it is said, and with truth, that this is not the test, and that the question is, what idea they would convey to a person reading them prior to the date of the patent which is in contest in the present suit. The learned counsel for the appellants argued strenuously at the bar that in the light of the more limited information then available such a reader would not be led to a knowledge of the device described in Brush's patent. They contended, moreover, that in other parts of Varley's specification statements are to be found which, taken in connection with the passage relied on, would lead the reader away from the conception of this scheme of compound winding. It is necessary, therefore, to inquire what was the state of knowledge prior to 1878. The system of series-winding was well known. By this arrangement the current generated is led round the magnets, and from the magnets is conducted to the lamps, or to serve the other purposes for which it is to be employed, and then back to the machine so as to complete the circuit. This device was subject to the defect that the magnetism of the magnets might be diminished at the very time when it was desirable that the current generated should be maintained. In May, 1876, letters patent were sealed bearing date the 11th of December previous, the specification of which, it is admitted, disclosed the shunt system of winding, by which one part of the current is diverted to maintain the magnetism of the soft iron magnets, whilst the remainder is used to produce the electric light, or serve any other purpose for which the current is required. It was urged on behalf of the appellants that there was no evidence that the invention thus disclosed had become commonly known prior to 1878, or that it had ever been put in operation, and that Varley's specification ought, therefore, not to be construed on the assumption that those who read it would be acquainted with the shunt system of winding. I cannot accede to this view. It appears certain that at the date

(1) Ante, p. 372.

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when he took out his patent Varley was acquainted with the shunt system, and, indeed, with the shunt-series system of winding, for this is conclusively established by the drawing made by him which was put in evidence. Of course, I do not refer to this for the purpose of construing his specification, but only as bearing on the question whether the shunt system was known prior to 1878. The shunt system had been described in Clark's specification of 1875, and it is impossible to say that other electricians may not have been, like Varley, acquainted with it. Under these circumstances, I cannot regard it otherwise than as part of the stock of public knowledge, which must be taken into account when approaching the construction of Varley's specification. Taking, then, the shunt system and the series system of winding as both known, what information ought the specification of Varley to be regarded as conveying? The words with which the important passage in Varley's specification commences appear to me to be apt to describe the shunt system. It is impossible not to be struck with the similarity of the language used to that which is to be found in the part of Brush's specification, which was avowedly describing that system. I am not much struck with the suggestion that the words "the remaining portion is used to produce the electric light" indicate that the use was to be for that purpose alone, and that this portion of the current was to play no part in maintaining the magnetism of the magnets, and that the description is therefore inconsistent with the shunt-series system. It seems to me impossible so to understand the language employed when the import of the sentences which immediately follow is considered. Indeed, it is admitted by one of the defendants' witnesses, Professor Sylvanus Thompson, that the criticism resolves itself into this, that he finds in two sentences what he might have expected to find in one. But a passage such as that with which we are dealing, in which each sentence is obviously connected with those which precede and follow, must be construed as a whole, and such a criticism as that which has been applied to it appears to me wholly inadmissible. Then it is said that, although compound winding is described, it would not be understood at that time to refer to compound winding as now understood, but to

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the winding on the magnets of two wires the current of electricity in each of which was separately excited. But the fact that it is prescribed that one of the two wires is to have a larger resistance than the other, and the statement that when the electric light is being produced "the greater portion of electricity" passes through the circuit of less resistance, appear to me not to suggest the idea of separate excitation, but the contrary; and when the whole passage is read together this impression is strengthened. And it is admitted by the defendants' witnesses that there is at least one passage in the specification inconsistent with the idea that separate excitation was contemplated. The argument that other parts of Varley's specification would lead the reader away from the conception of compound winding was mainly founded upon this passage: "The insulated wire composing the helices is connected to the insulated wire surrounding the soft iron magnets of the machine, and is usually inserted in the circuit of greater resistance." It was argued that if this were done the circuit of greater resistance would not be always closed. This assertion is controverted. But whether it be correct or no, I do not think the words relied on would lead any one reading the earlier part of the specification to the conclusion that the circuit of greater resistance was not intended to be always closed in face of the express statement that it was to be so. The other criticisms were, to my mind, of less weight, and I do not think that any part of the specification would divert a reader of the important passage on which the controversy has mainly turned from the idea of shunt-series winding. Sir W. Thomson, one of the defendants' witnesses, admits that it is quite probable that in 1876 a workman might have been led to series-shunt winding by Varley's descriptions. And Professor Sylvanus Thompson says: "If a workman of the present day were to read Varley's patent, I think he would read it as describing a shunt-series machine, because he would read the knowledge of the present day into it, and that would alter the meaning he attached to the language." Now, I admit the difficulty of divesting oneself of existing knowledge, and interpreting any description as it would have been interpreted when the stock of knowledge was more limited. But to any one acquainted with the shunt and series

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systems, I think the same idea would be conveyed as is conveyed now. If to a person cognisant of these two systems the conception of their combination into the shunt-series system would have constituted a new departure, the case might have assumed a different complexion; but it is clear that Varley did not regard this combination as a new discovery. And I think it is impossible to read Brush's specification without seeing that when once he had arrived at the shunt system the application of it in conjunction with the series system appeared to follow as a corollary. His object was to secure a permanent magnetic field. He attained this object by means of the shunt system. His words are: "I attain my object by diverting from external work a portion of the current of the machine, and using it either alone or in connection with the rest of the current for working the field magnets." He treats the shunt-series system, in truth, as a mere modification of the shunt system, of which he believed himself to be the inventor, though he has naturally a distinct claim to cover this modification.

The learned counsel for the appellants laid great stress on the fact that since Brush's specification the shunt-series system has come largely into use, and deduced from it the argument that it could not previously have been known. But it must be remembered that the importance of this system has only become very marked since the incandescent lamp has come into use. In connection with this form of electric lighting it is no doubt of the highest importance to secure a constant potential. And this object is best attained by the shunt-series system; the defects of each of these systems when used separately tending to counteract one another when they are used in combination. But there is not a trace in Brush's specification of this idea of a constant potential. What he was concerned to obtain was a permanent magnetic field. He expresses his preference for the combined systems, "especially for electroplating machines." It is true that a certain number—not, I think, a very large number—of Brush's machines were introduced into this country for electroplating purposes before the days of the incandescent lamp. It is, however, regarded as an open question whether pure shunt is not better for the purpose of electroplating than series-shunt

owing to the possibility that the polarity of the magnets may be reversed. It would seem that whilst the latter system is more in vogue in America, the former is given the preference in this country. I am satisfied that neither Varley nor Brush had in his mind the importance of maintaining a constant potential. But for the reasons I have given I think that any electrician reading Varley's specification with a knowledge of the two systems of series and shunt would have found there a description, which he would have had no difficulty in giving practical effect to, of the system of compound winding known as series-shunt.

Having arrived at this conclusion, it is unnecessary to determine the effect of the use of the machine constructed under Varley's instructions, though I think it would be a matter for serious consideration whether after that use the appellants' patent could be supported.

I think the judgment of the Court below was right, and ought to be affirmed.

LORD MACNAGHTEN:—

My Lords, I have had an opportunity of reading in print the opinions which have just been delivered, and I only desire to say that I concur in the judgment which has been proposed, and in the reasons which have been assigned by my noble and learned friends.

LORD FIELD:—

My Lords, I have very carefully read and considered the evidence in this case, and the authorities bearing upon the questions involved in it, and I have had the advantage of perusing the opinions expressed by the Lord Chancellor and my noble and learned friends.

I entirely agree with them that the appeal should be dismissed, and for the reasons which they have given; and even if I could succeed in stating those reasons in different—it could not be in better—language.

I entertain, in common with my noble friend Lord Watson, some doubt whether the alleged prior use of the Varley machine was such as to avoid the appellants' patent, and if it had been

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necessary to decide that point, I should have wished to have heard the argument on behalf of the respondents; but, in the view I take of the case, that becomes unnecessary.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 5th April, 1892.

Agents for appellants: *Renshaws, for Mackenzie, Innes, & Logan, W.S., Edinburgh.*

Agents for respondents: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

[PRIVY COUNCIL.]

BUCKLEY . . . . . PLAINTIFF;

AND

EDWARDS . . . . . DEFENDANT.

J. C.*
1892
March 23, 30; May 21.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Supreme Court Judges Act, 1858, *s.* 2—*Statutory Limitation of Power to appoint Judges.*

The 2nd section of the Supreme Court Judges Act of 1858 provides that "the Supreme Court of New Zealand shall consist of one judge, to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint":—

Held, that this section can only be construed consistently with other parts of the Act (see sect. 6 especially) as vesting in the Governor the appointment of judges to whom an ascertained salary is payable by law at the time of their appointment; and that the Act of 1882 did not affect this limitation of the Governor's power of appointment.

APPEAL from a judgment of the Court of Appeal (May 27, 1891) ordering judgment for the respondent in an action by the appellant as Attorney-General of New Zealand.

The question was whether the respondent had been validly appointed a puisne judge of the Supreme Court by virtue of a commission dated the 2nd of March, 1890, under the circumstances stated in the judgment of their Lordships.

The respondent, in answer to the appellant's motion (which was removed into the Court of Appeal under sect. 13 of the Act of 1882), claimed that he had been duly appointed under the said commission, and alleged that certain negotiations and correspondence to which he referred constituted a contract binding on the Crown whereby his salary as a judge was ascertained and established.

A majority of the Court (Prendergast, C.J., and Conolly, J., dissenting) held that the appointment was valid. The minority

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, LORD HANNEN, and SIR RICHARD COUCH.

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held that, as there was no vacancy on the 2nd of March, 1890, by death, removal, or resignation of any of the four then existing puisne judges; and as the General Assembly had not provided out of revenue for the salary and allowances of a fifth puisne judge, there was no power on the part of the Crown to appoint the respondent. The majority held that, under the Supreme Court Act of 1882, and other legislation, the Crown had power to appoint an additional puisne judge, and that the respondent's appointment was valid.

Sir *H. Davey*, Q.C., *Rigby*, Q.C., and *Butcher*, for the appellant, contended that the Governor's power to appoint a judge of the Supreme Court did not arise until a salary had been ascertained, established, and provided for him by law. At the date of the respondent's commission, only four permanent puisne judgeships were created and provided for by the legislature of the colony. Reference was made to an Ordinance of 1841, Session II., No. 1, sects. 1 and 8; an Ordinance of 1844, Session III., No. 1, sects. 1 and 10, which had been repealed by the Repeals Act, 1878 (subject to numerous savings); also to Imperial Act 15 & 16 Vict. c. 72, sects. 64, 65; to sects. 2, 3, 6, and 8 of the Supreme Court Judges Act, 1858, which repealed sect. 10 of the Ordinance of 1844. The Acts now in force are the Civil List Act (1863) Amendment Act, 1873; and the Supreme Court Act, 1882. Sect. 2 of the former Act was referred to, and Part I. of the latter, sects. 4, 5, 7–14. No Act of the General Assembly had been passed authorizing an increase to the number of judges authorized and provided for by this legislation. There was no vacancy existing at the date of the respondent's commission. The respondent's appointment was not by way of substitution for or succession to any existing judge, nor did it purport to be made under sect. 12 of the Act of 1882. No salary for him as puisne judge had been ascertained and established and provided for him by statute law or otherwise. The House of Representatives has refused to vote him a salary and refused leave to bring in a Bill to validate his appointment. Reference was made to *Cox* v. *Hakes* (1).

(1) 15 App. Cas. 506.

Sir *W. Phillimore*, Q.C., *Danckwerts*, and *Ollivier*, for the respondent, contended that, under the legislation referred to, and having regard to the prerogative of the Crown, the Governor had power to appoint the respondent. His authority, acting on Her Majesty's behalf, was not limited to filling up vacancies. The 2nd section of the Act of 1858 enabled the Governor to appoint as many judges as he pleased. The circumstances here were that, after the passing of the Native Land Courts Acts Amendment Act, 1889, the respondent was offered and declined the Chief Commissionership of the Native Land Court. Afterwards he was offered and accepted the offices of a puisne judgeship and the commissionership at the same salary as a puisne judge. Judges' salaries are paid by the department of Justice; the commissioners' salaries are paid by the department of the Native Minister. The respondent has received his salary through the department of Justice, the same being charged to unauthorized expenditure under the provisions of the Public Revenue Act, 1878, ss. 44, 45, and 46. The augmentation of the civil list, or the appropriation of a sum out of revenue to the respondent's salary, was not a condition precedent to his valid appointment as an additional judge. The legislation referred to has not created such condition precedent. There are numerous authorities to shew that the number of judges in England was not a fixed quantity, and that an addition thereto could be made by the Crown. The number has varied from time to time. See Coke, 4th Inst., 79 and 80; Blackstone's Commentaries, bk. iii. c. 4; Stephen's Commentaries, bk. v. c. 5. Salaries were not settled: see 32 Geo. 2, c. 35, preamble, ss. 1, 9, and 13; 1 Geo. 3, c. 1, by which the civil list was established and the judges paid out of it; 1 Geo. 3, c. 23, ss. 2, 3, and 4. [LORD HERSCHELL:—Then, in 1760, no judge existed in England whose salary was not secured to him by Act of Parliament.] See, also, 5 Geo. 3, c. 47, s. 9; 6 Geo. 4, c. 82, 83, 84, and sect. 6 of the last Act; 11 Geo. 4 & 1 Will. 4, c. 70; *Re Bishop of Natal* (1); Bacon's Abridgment, tit. Courts, p. 387. The constitutional practice in the colonies is to appoint as many judges as the Crown thinks fit, to pay them proper salaries, and to appoint

(1) 3 Moo. P. C. (N.S.) 152.

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them during pleasure only. [LORD HERSCHELL:—But, under the circumstances of this case, one question is whether the respondent was placed in the position of independence contemplated by the Acts which authorized a local appointment.] See the Civil List Act, 1858. Reference was then made to T. Raymond's Rep. 475; Lord Raymond's Rep. vol. ii. pp. 1317, 1319. [LORD HERSCHELL:—What is the date of the last appointment of a judge by the Crown without parliamentary arrangement?] By James I., in 1603 or 1604. See Coke's Rep., Part XIII. p. 31; Jentleman's case, Coke, Part VI. p. 11; Comyn's Digest, Prerog. D. 28. In New Zealand the practice is to increase the number of judges as the growth of the colony requires. There were three puisne judges in office while the schedule to the Civil List Act, 1858, was in force, which only provided for two. Reference was further made to Viner's Abridgment, Judges (C), p. 577, (L) p. 582; *Smyth* v. *Latham* (1).

Rigby, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HERSCHELL:—

On the 2nd of March, 1890, His Excellency the Governor of New Zealand issued a commission to the respondent appointing him a puisne judge of the Supreme Court of New Zealand, to hold the office during good behaviour. On the previous day the then Premier of New Zealand wrote a letter to the respondent informing him that the Governor had approved of his appointment to the office of a commissioner under the Native Land Court Acts Amendment Act, 1889, and that it had appeared to the Government that, for an office of such importance, the commissioner should have the status of a judge of the Supreme Court, and therefore he would be appointed to that office also. The letter added that the demands on the time of the judges caused unavoidable delay in the despatch of business, and that it was hoped that this arrangement, by which the respondent would afford occasional assistance in the Supreme Court work, would

(1) 9 Bing. 692.

temporarily meet the requirements. On the 6th of March, 1890, the commission appointing him a judge was transmitted to the respondent, together with an Order in Council appointing him and Mr. John Ormsby to be commissioners under the Native Land Act above mentioned. The appointment of the respondent as commissioner came to an end on the 31st of March, 1891. No salary had at the time of his appointment, or has since, been provided for the respondent as puisne judge by the General Assembly of New Zealand, nor was there any parliamentary sanction for the appointment of an additional puisne judge unless it is to be found in prior legislation. It may be added that shortly after the appointment of the respondent a change of government took place in the colony, and that the House of Representatives of New Zealand has refused to vote any salary for the respondent as a judge of the Supreme Court, and that, although a bill to amend the Supreme Court Act, 1882, and to provide for the payment of an additional judge, was transmitted by the Governor to the House of Representatives, leave to introduce such bill was not given.

Under these circumstances the appellant, as Attorney-General of New Zealand, filed his statement of claim in the Supreme Court. On the 6th of May, notice of motion was filed on behalf of the appellant, calling on the respondent to shew cause why he should not shew by what warrant and authority he claimed to exercise the office of judge of the Supreme Court of New Zealand, or why his commission of judge of the Supreme Court of New Zealand should not be cancelled. This motion was heard by the Court of Appeal, and judgment was pronounced in favour of the respondent by three learned judges, the Chief Justice and one other judge dissenting.

The question raised is one of grave importance, the contention on the part of the respondent being that as the law stands in New Zealand the Governor has the power of adding without limit to the number of the judges of the Supreme Court of that Colony without express parliamentary sanction, and in the absence of any parliamentary provision for the salaries of the judges so appointed.

Both sides have placed reliance upon the law which has

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prevailed in England governing the appointment of judges. Their Lordships do not propose to deal with this subject in detail, as it can have only an indirect bearing upon the question to be determined, which must depend upon the construction of certain New Zealand statutes. It appears certain that since the reign of James I., with two possible exceptions, the latest of which dates back as far as 1714, no addition has been made to the number of judges without express parliamentary sanction. In the Act of Settlement it was provided that the judges' commissions should be made quam diu se bene gesserint, "and that their salaries should be ascertained and established." The latter provision was not completely carried into effect until a subsequent period. The remuneration of the judges was in former times derived partly from fees and partly from the civil list of the Sovereign. By several Acts passed prior to the reign of George III., the salaries of the judges were in part provided by certain sums charged upon the duties granted by those Acts. The Act of the first year of Geo. 3, c. 23, recited the provision of the Act of Settlement to which attention has been called. It recited further, that His Majesty had been pleased to declare from the throne to both Houses of Parliament that he looked upon the independence and uprightness of the judges as essential to the administration of justice and as one of the best securities of the rights and liberties of his subjects, and that in consequence thereof His Majesty had recommended to Parliament to make further provision for the continuing judges in office notwithstanding the demise of His Majesty; and that His Majesty had also desired his faithful Commons that he might be enabled to secure the salaries of judges during the continuance of their commissions. After these recitals, it was enacted that such salaries as were settled on judges by Act of Parliament, and also such salaries as had been or should be granted by His Majesty, his heirs and successors, to any judge or judges, should in all times coming be paid and payable to every such judge and judges for the time being so long as their patents or commissions should remain in force, and should, after the demise of the Crown, be charged upon and payable out of such of the duties and revenues granted for the use of the civil government of His Majesty, his heirs and

successors as should be subsisting after such demise, until further provision was made by Parliament. By an Act of the 6 Geo. 4, the salaries of the puisne judges were fixed at £5000 a year, and charged upon the Consolidated Fund.

Their Lordships think that the Act of the 1 Geo. 3, c. 23, would render it difficult to contend that the Crown could after that date appoint additional judges for the payment of salary to whom Parliament had given no sanction. For the salaries of the judges were then, by the authority of Parliament, secured to them during the continuance of their commissions, and after the demise of the Sovereign were charged upon the revenues granted by Parliament for the civil government of the realm. The recital which precedes this legislation shews that, with a view to their independence, it must have been intended that all the judges should be in this position, and it certainly cannot have been the intention of Parliament to enable the Sovereign to increase without its sanction the charges which after the demise of the Sovereign were to be imposed upon the revenues of the realm.

Down to the year 1852 New Zealand was a Crown Colony; it was only then that it received complete representative institutions. Whilst it was thus a Crown Colony an Ordinance was passed in the year 1841 by the Governor, with the advice and consent of the Legislative Council, establishing a Supreme Court for New Zealand, and defining its jurisdiction, constitution, and practice. The 8th section is as follows: "The Court shall be holden before one judge who shall be called the Chief Justice of New Zealand and such other judges as Her Majesty or the Governor shall from time to time be pleased to appoint." This provision was, with some others, contained in the Ordinance, modified by another Ordinance passed in the year 1844, the 10th clause of which is in these terms: "The Court shall consist of one judge who shall be called the Chief Justice of New Zealand and of such other judges as Her Majesty shall from time to time be pleased to appoint. Provided that it shall be lawful for his Excellency the Governor to appoint such judges provisionally until Her Majesty's pleasure shall be known. The judges of the Court shall hold their office during Her Majesty's

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pleasure." It is clear that as regards the Crown these were not enabling provisions. The power of the Crown to appoint in a Crown Colony such judges as might be deemed advisable could not be doubted. But whilst the earlier Ordinance had conferred upon the Governor power to appoint absolutely, the later one gave him this power provisionally only, until Her Majesty's pleasure was known, and further provided in terms, which the previous Ordinance had not done, that the judges should hold their office during Her Majesty's pleasure.

By the Imperial Act of the 15 & 16 Vict. c. 72, a representative constitution was granted to the Colony of New Zealand. The 64th section of this Act is, so far as material, as follows: "There shall be payable to Her Majesty every year . . . the several sums mentioned in the schedule to this Act, such several sums to be paid for defraying the expenses of the services and purposes mentioned in such schedule." By sect. 65 the General Assembly of New Zealand was empowered by any Act or Acts to alter all or any of the sums mentioned in the schedule, and the appropriation of such sums to the services and purposes therein mentioned, but until and subject to such alteration by Act or Acts as aforesaid the salaries of the Governor and judges were to be those respectively set against their several offices in the schedule. In the schedule to the Act occur these words, "Chief Justice, £1000; puisne judge, £800." The section concludes with the following proviso: "Provided always that it shall not be lawful for the said General Assembly, by any such Act as aforesaid, to make any diminution in the salary of any judge to take effect during the continuance in office of any person being such judge at the time of the passing of such Act." It is manifest that this limitation of the legislative power of the General Assembly was designed to secure the independence of the judges. It was not to be in the power of the Colonial Parliament to affect the salary of any judge to his prejudice during his continuance in office. But if the executive could appoint a judge without any salary, and he needed to come to Parliament each year for remuneration for his services, the proviso would be rendered practically ineffectual, and the end sought to be gained would be defeated. It may well be doubted whether this proviso does

not by implication declare that no judge shall thereafter be appointed save with a salary provided by law, to which he shall be entitled during his continuance in office, and his right to which could only be affected by that action of the New Zealand Legislature which is excluded by the Imperial Act.

It appears from the affidavit of Mr. Francis Harrison that Gresson, J., was temporarily appointed a puisne judge on the 8th of December, 1857. The affidavit does not state under what circumstances this took place, nor does it expressly state that the office of puisne judge was full at that time; but it may be presumed that the predecessor of Johnston, J., who was appointed on the 3rd of November, 1858, then held that office. The appointment of Gresson, J., probably purported to be made by the Governor under the powers of the Ordinance of 1844 which had not been repealed. Under these circumstances it was only natural that the whole subject of the status of the judges, and the salaries to which they were to be entitled, should be brought under the consideration of the legislature. Accordingly two Acts were passed by the legislature in the following year, the one entitled, "An Act to regulate the appointment and tenure of office of the judges of the Supreme Court," the other, "An Act to alter the sums granted to Her Majesty by the Constitution Act for civil and judicial services." By the Supreme Court Judges Act, the 10th section of the Ordinance of 1844 was repealed. The 2nd and 3rd sections were as follows: "2. The Supreme Court of New Zealand shall consist of one Judge to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other judges as His Excellency in the name and on behalf of Her Majesty shall from time to time appoint." 3. "The commission of the present Chief Justice and of every Chief Justice and other judge of the said Court to be hereafter appointed (except as hereinafter provided) shall be and continue in force during their good behaviour, notwithstanding the demise of Her Majesty, any law, usage, or practice to the contrary notwithstanding." The 4th clause empowered the Governor at his discretion, in the name and on behalf of Her Majesty, upon the address of both Houses of the General Assembly, to remove any such judge

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from his office. It is needless to comment upon the important change which the 3rd clause made in the status of the judges thereafter appointed. It is contended that the 2nd clause in terms enabled the Governor to appoint as many additional judges as he pleased; that though Parliament might not have sanctioned any increase of the judiciary, or provided any salary for the judges so appointed, the Governor might appoint any number of judges without salary, or, as in the present case, with a salary temporarily provided by Parliament for other services, whose commissions should not be temporary but should continue in force during their good behaviour. It certainly would be startling to find that, when the tenure of the judicial office was so materially altered, this power had been vested in the Governor by the advice of his executive, for it is to be observed that whilst, under the Ordinance of 1844, the Governor could only appoint provisionally until Her Majesty's pleasure was known, this Act enables him to appoint absolutely in the name and on behalf of Her Majesty. Their Lordships need not dwell upon the importance of maintaining the independence of the judges; it cannot be doubted that, whatever disadvantages may attach to such a system, the public gain is, on the whole, great. It tends to secure an impartial and fearless administration of justice, and acts as a salutary safeguard against any arbitrary action of the executive. The mischief likely to result if the construction contended for by the respondent be adopted is forcibly pointed out by one of the learned judges, who held the appointment now in question to be valid. He said: "In the present case, until such time as the matter may be finally dealt with by Parliament, the position will undoubtedly remain most unsatisfactory. The judge is absolutely dependent upon the ministry of the day for the payment of any salary, and has to come before Parliament as a suppliant to ask that a salary be given him. It is difficult to conceive a position of greater dependence. No judge so placed could indeed properly exercise the duties of his office. One of these duties, for instance, is the trial of petitions against the return of members to Parliament. How could a judge in this position be asked to take part in such a trial? Against the occurrence of such a state of things obviously neither the power

of the purse which Parliament has, nor the power of removal by address, can be a sufficient protection." Nevertheless, weighty as these considerations are, if the natural meaning of the general words used be to confer the power contended for, and if there be no other provisions in the Act shewing that this was not the intention of the legislature, effect must be given to the enactment without regard to the consequences. But it cannot be disputed that it is legitimate to read every part of an Act in order to see what construction ought to be put upon any particular provision contained in it. Now the 6th section of the Supreme Court Judges Act provides that "a salary equal at least in amount to that which, at the time of the appointment of any judge, shall be then payable by law, shall be paid to such judge so long as his patent or commission shall continue and remain in force." The language of this section is imperative and general. How can its requirements possibly be complied with in any reasonable sense, in the case of a judge to whom at the time of his appointment there was no salary payable by law? Is this not a clear indication of the intention of the legislature that there should be no appointment of a judge unless at the time of his appointment there was a fixed salary payable to him by law in respect of his office? It is inconceivable that it should have intended to enable the creation of two classes of judges, the one entitled by law from the time of their appointment to a salary unalterable during the continuance of their commission, the other without any legal right to salary at all. There was some controversy as to what the salary "then payable by law" referred to. Their Lordships think this is made clear by a reference to the Civil List Act of the same year, which must be read with the 6th section of the Supreme Court Judges Act. It was said in the Court below that this, and the other Civil List Acts, to which reference will have to be made, were mere money bills, but though the parliamentary incidents of such bills are no doubt special, when they pass into law, they do not, in their Lordships' opinion, differ from any other Acts of the legislature. The Civil List Act, 1858, provides that there shall be payable to Her Majesty the several sums mentioned in the schedule to this Act, instead and in lieu of the sums

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mentioned in the schedule to the Constitution Act of the 15th and 16th Victoria. The schedule to the Civil List Act contains these words: "Chief Justice, 1400; first puisne judge, 1000; second puisne judge, 1000." Reading the two statutes together, the effect of the Civil List Act of 1858 clearly is to provide that the salaries of the Chief Justice and two puisne judges "shall be those respectively set against their several offices in the schedule." This Act, though reserved for the signification of Her Majesty's pleasure on the 21st of August, 1858, did not receive the Royal Assent until the 25th of July, 1859; but it is significant that its 2nd clause provided that it should "be deemed to take effect on and after the 1st day of July, 1858," immediately prior to the Supreme Court Judges Act which came into force on July 3 following. What was meant, therefore, in the 6th clause of the Supreme Court Judges Act by the salary payable by law to a judge on his appointment does not admit of doubt. There was a fixed salary payable to the Chief Justice and one puisne judge under the Constitution Act, and the Civil List Act, 1858, made provision for the payment of a fixed salary to the Chief Justice, and to two puisne judges respectively, which could only be altered by fresh legislation.

But the 6th section of the Supreme Court Judges Act is not the only one which throws light on the construction to be put upon the 2nd section of that Act. The 7th section empowers the Governor in Council, at any time during the illness or absence of any judge appointed as aforesaid, or for any other temporary purpose, to appoint a judge or judges of the Supreme Court to hold office during his Excellency's pleasure, and it provides that every such judge shall be paid such salary "not exceeding the amount payable by law to a puisne judge of the said court," as the Governor in Council shall think fit to direct. This section clearly implies that there will be a fixed salary payable to any person filling the office of puisne judge of the Supreme Court. If a puisne judge can be appointed to whom there is no amount payable as salary, what will be the operation of this section? The superannuation clauses point in the same direction, though perhaps not so forcibly. They imply, however, that *every* judge of the Supreme Court will be entitled to an

annual salary at the time of his resignation. Returning now to the 2nd clause, which is more immediately under consideration, it is to be observed that even if it be confined, by reference to other parts of the Act, to the appointment of judges to whom a fixed salary is payable by law at the time of their appointment, every word of the section, the main object of which was manifestly to define the constitution of the Supreme Court, and to prescribe the mode of the appointment of the judges, would still be necessary, and would have full effect. In view of the considerations to which attention has been called, their Lordships are of opinion that the section can, consistently with other parts of the Act, only be construed as vesting in the Governor the appointment of judges to whom an ascertained salary is payable by law at the time of their appointment. None of the judges in the Court below appears to have doubted the expediency of such a construction if it be legitimate, and their Lordships think that it is the only one which will give full and consistent effect to all the provisions of the Act.

Their Lordships have dealt thus fully with the construction of the Supreme Court Judges Act of 1858, although it is not the statute which now regulates the appointment of judges, because, if it could have been shewn that it bore the construction contended for, it would not have been possible to resist the conclusion, having regard to the terms of the Act of 1882, that the power which it conferred upon the Governor was still vested in him. If, on the other hand, the Act of 1858 conferred no such power, this is a legitimate consideration when inquiring into the effect of the later Act. Before proceeding to this inquiry, it will be desirable to refer to the intermediate legislation, as some stress has been laid upon it. The Civil List Act, 1862, substituted for the sums mentioned in the schedule to the Civil List Act of 1858 the following: "Judges, £6200." The Civil List Act of 1863 substituted £7700 for £6200 as the sum payable to the judges. Whilst each of these Acts increased the sum payable, neither of them specified how the respective sums were to be distributed amongst the judges. It appears to have been afterwards thought, not unnaturally, that this was objectionable, and accordingly an Act was passed in 1873 to amend

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the Civil List Act, 1863, which, after reciting that it was expedient that the sum of £7700 granted to Her Majesty by that Act for defraying the salaries and expenses of the judges of the Supreme Court should be more definitely appropriated to such service, enacted that this sum should "be applied in paying to the judges of the said Court respectively the annual salaries specified in the first schedule" thereto. The schedule was in these terms: "Annual salary of the Chief Justice of the Supreme Court, £1700. Annual salaries of four puisne judges of the Supreme Court, each £1500—£6000." This enactment implies that, unless the legislature should intervene, "the judges of the Supreme Court," other than the Chief Justice, would be four in number only. This statute was in force, unaltered, at the time the Supreme Court Act, 1882, was passed. The object of that Act was, it is to be gathered, to make certain alterations in the practice and procedure of the Court; but it was evidently thought convenient that the judicature provisions should also be found in the same Act, so as to render it a complete code.

Part I. of the Act consists, therefore, in substance, of a re-enactment of the Supreme Court Judges Act, with the addition of a provision defining the qualifications requisite for appointment to the office of judge. The 7th section of the earlier Act is repeated with an immaterial verbal alteration. For the 6th section, however, the following is substituted: "11. The salary of a judge shall not be diminished during the continuance of his commission." What was the cause for this change does not appear. But it affords no ground for the conclusion that it was intended to affect the limitation of the power of appointing judges which, in their Lordships' opinion, was then in force. The 11th section of the Act of 1882, as distinctly as the 6th section of the earlier Act, involves the necessity of a salary being fixed at the commencement of the judge's commission.

Some stress was laid in the argument for the respondent upon the interpretation which it was alleged had been put upon the Supreme Court Judges Act, as evidenced by certain appointments made by the Governor. It appears that Gillies, J., and Williams, J., were appointed in 1875, about a month before the resignation of the learned judges whom they were to succeed

was gazetted. Richmond, J., and Chapman, J., received their appointments in 1862 and 1864, before the Civil List Acts of 1862 and 1863, each of which provided the salary for an additional judge, came respectively into force, though after they had passed the legislature and had been reserved for Her Majesty's pleasure to be signified. The former Act provided that it was to take effect from the 1st of July, 1862, a date prior to the appointment of Richmond, J.; but there was no such provision in the Civil List Act, 1863. It is manifest that all these were intended to be appointments of judges to whose office a salary was regarded as already secured by the legislature. And Gresson, J., whose appointment was the first made under the Act of 1858, did not receive his commission until the day after the Act providing a salary for him had come into force. Their Lordships cannot attribute any weight to the facts relied on as affecting the interpretation of the enactments which have to be construed. There may have been irregularity in some of these appointments, and it would be contrary to sound principle to allow the interpretation indicated by any such practice, even if it had been uniform and unequivocal, to guide the Court in the construction of a modern statute.

Their Lordships will humbly advise Her Majesty that the judgment of the Court of Appeal of New Zealand should be reversed, and judgment on the motion entered for the Attorney-General. Under the peculiar circumstances of this case, their Lordships do not think that the respondent should be ordered to pay the costs in the Court below or of this appeal.

Solicitors for the appellant: *Mackrell, Maton, & Godlee.*

Solicitors for the respondent: *Rowcliffes, Rawle, Johnstone, & Gregory.*

[PRIVY COUNCIL.]

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March 9;
May 21.

ATTORNEY-GENERAL AND RECEIVER-GENERAL FOR JERSEY . . . . } PLAINTIFFS;

AND

LE MOIGNAN . . . . . DEFENDANT.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Crown Fiefs—Liability of Prévôt—Rents—Practice as to Documents not before the Court below.

Held, that the Crown is entitled to demand of the Queen's Prévôt in the parish of St. John personally the payment of the rents due in respect of its fief in the said parish, whether or not he has received the contribution thereto of his co-tenants:

Held, further, that there is no obligation on the Crown to furnish the Prévôt with a list of the persons liable to contribute in respect of the said rent.

It was ordered in this case that certain documents not before the Court below should be received by the Registrar and produced at the hearing, subject to objection as to admissibility.

APPEAL from the Royal Court (Superior Number, May 13, 1889), affirming a judgment of the Inferior Number (Nov. 10, 1888).

The question in the appeal was as to the liability of Prévôts with respect to the rents and dues arising out of Crown fiefs in the island, and payable "par assemblement" by the Prévôt, whether it was a condition precedent thereto that the Crown should furnish him with a list of persons who owed rents and dues so as to enable him to collect the same.

As a matter of practice with regard to Jersey appeals, it may be mentioned that the documents referred to before their Lordships were not all referred to before the Royal Court. On the 2nd of May, 1891, a petition was presented by the appellants praying that certain documents scheduled thereto might be treated as part of their case. It was ordered on that date that

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

some of the said documents should be transmitted to the Registrar of the Privy Council, and that the appellants should be at liberty to lodge in his office the remaining documents in the schedule, and that the same might be referred to on the appeal, subject to any objection as to their admissibility.

The judgment of the Royal Court was based upon the following grounds:—

That it appears from the extents exhibited that the rents or dues claimed in the action are due "par assemblage," but that the respondent alleged that he had been unable to obtain from Her Majesty's Receiver-General the list of the persons owing the said rents and dues, and that this was not denied by the appellants; that this is a Prévôté Receveuse; that although every Prévôt Receveur is charged with the collection of the moneys due to the lord from his vassals, and is in the first instance responsible for the non-payment thereof, it is the lord's duty to give him a list or roll of the rights which are due to him (the lord), in which list or roll the lord is bound to indicate the seignorial rents and dues demandable and not disputed, and that in case of any of the rents indicated in the roll being disputed, the lord is bound to proceed for the same on the report of the Prévôt, who remains discharged therefrom till the refusal is determined.

The Attorney-General (*Sir R. Webster*), *Venables Vernon* (*Attorney-General for Jersey*), and *Sutton*, for the appellants:—

The rents now in question are due as an undivided total from the respondent without regard to the individual contributions by which they are constituted. The tenants of the fief are bound every year to elect or otherwise furnish a Prévôt amongst themselves to pay the rents in question so that the Crown may not receive them in morsels. The tenants are responsible to the Prévôt, who is one of the larger tenants, or his substitute; the tenants, in case of his insolvency, are guarantors of his debt. Reference was made to the Royal extents for the island in 1331, 1528, 1607, and 1668, three of which are recited in the judgment of their Lordships. They establish the liability of the respondent. There is no law or custom in Jersey to warrant the decision appealed from. It would subvert the ancient relations between

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the Crown and the Prévôts and tenants of its fiefs. The judgment of the Royal Court was based on the case of the Marquis de Pirou, as quoted and commented on by the commentators of the seventeenth century upon the Coutume Réformée of Normandy, which was codified in 1585. It was decided in 1693, after the Coutume Réformée had been modified by Parliament in relief of the Prévôts. But that case and the commentaries are not authorities. The regulations laid down by the Norman Court in that case only relate to Prévôts upon whom a duty of service has devolved, and only deal with rents due to the lord which arise out of particular lands and tenements within the manor. They do not refer to this case, which is one of a Prévôt Receveur liable himself as debtor for rents due integrally in respect of the whole fief. In the case of the Marquis, the rents were due by the individual tenants to him, and not to the Prévôt. Besides, the regulations only laid down that a Prévôt should be furnished with a list of the rents demandable, not of the persons who owe them. The Norman tenure under the Coutume Réformée differs in many respects from the tenure of the Jersey Crown fiefs. With regard to Prévôté Receveuse referred to in the judgment, there are, according to the Norman commentators, (1.) a prévôt commandeur, whose duties are executive; (2.) a prévôt receveur, who adds thereto the duty of collecting rents for the lord and making them good to him; (3) a "côtière." These distinctions do not apply to Prévôts in Jersey. The duties of a prévôt of a Crown fief are more extensive. Reference was made to certain Acts of the Royal Court, dated April 23rd, 1597, and January 19, 1598; May 3, 1779; October 9, 1634; July 25, 1700; May 27, 1775. Poingdestre's Commentaries on the Coutume Réformée, art. 175; Dict. de l'Ancienne Langue Française, by Vieweg, 1881, tit. Assemblement; Britton, vol. 2, p. 29, sects. 7, 23; Bracton, vol. 1, pp. 612, 613; vol. 2, pp. 15, 16; Basnage, Commentaries, ed. Rouen, 1778, art. 195. See also Viner's Abridgement, vol v., p. 162; Contribution and Average, para. 16; Maddox's Firma Burgi, p. 223, and History of Exchequer, vol. i. p. 330, for instances of a liability analogous to that of the Prévôt in this case.

The respondent did not appear.

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1892. May 21. The judgment of their Lordships was delivered by

LORD HANNEN:—

This is an action brought in the Royal Court of Jersey by (the appellants) the Attorney-General and the Receiver-General of that Island, to recover from the respondent, the Queen's Prévôt in the parish of St. John, 3 livres 16 sous, old French currency, and 9 hens, 3 pullets, 4 geese, and 40 eggs, being the rent due annually to Her Majesty for the years 1886, 1887, and 1888, in respect of her fief in the said parish.

The Prévôt, by way of defence, stated that he had always been ready to collect the rents which might be due to Her Majesty for the said fief, but that, in spite of his repeated applications, he had not been able to obtain from the Receiver-General the list of the persons who owed the said rents to Her Majesty.

Thus the only question raised by the Prévôt was, whether or not it was the duty of the Receiver-General to furnish him with such a list.

The Royal Court held that the appellants ought, for and in the name of Her Majesty, to furnish to the Prévôt a statement or list of the persons who owe the rents and dues claimed in the action, in order to enable the Prévôt to collect the same.

This judgment purports to be based on certain findings which are of importance. First, that it appears from the extent given in evidence that the rents and dues claimed are due "par assemblage"; secondly, that the Prévôté in question is a "Prévôté Receveuse"; thirdly, that every Prévôt Receveur is bound to collect the sums due from the vassals to the Lord, and is responsible in the first instance for their non-payment, but that the Lord is bound to give him a list of the seignorial rents and dues claimed, indicating those exigible and not disputed; fourthly, that, in the event of any of the rents or dues indicated in the list being disputed, the Lord is bound to defend them on notice from the Prévôt, who remains discharged till settlement of the dispute. This judgment was affirmed by a majority of the Royal Court (Superior Number), and the reasons (motifs) of the judgment were also adopted.

The present appeal is brought from the judgment of the

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Superior Number. The respondent (the Prévôt of St. John's), has not been represented on the argument of this appeal.

The nature of the tenure by which the fief in question in the parish of St. John is held appears from a series of documents, the earliest of which is an inquisition of 2 Edw. 1.

In an extent of 1331 (Edw. III.) it is said: "And it is is to be noted that the tenants of this fief are bound each year to elect a prévôt, who is bound to collect all the rents which are due of old to the Lord the King in the said fief."

In an extent of James I. (1607), after finding the rents and revenues in the fee of Esverert, it is said: "Also the sayd tenants shall yearly at Easter choose them one head officer of their owne perill called a Prevost, which Prevost ought to collect the Kinges ferme, and the amerciaments of the Kinges Courts, due within the said parish, and the same to deliver wholy unto the Kinges Receaver at the due and accustomed termes. Also the said Prevost ought to certifie unto the Bailiff or Kings Clarke all sales of lands or rents sould within the Kinges fee;" and it then proceeds under the heading of St. John: "The poullage, &c., due yearly to the King in this parish in manner and form aforesaid." It then enumerates five tenants owing "poullage to the Kings proper," and continues, "the Kings Provost of this parish: 4 geese, 9 hens, 3 chickens, 40 eggs. The Kings Provost of this parish oweth yearly by assemblement a grevery of 50 sous 9 drs." These are the dues now sued for.

In an extent of 1668 (Charles II.), under the heading of St. Jean, after enumerating the "Pains et poulages deubs au propre, et payable coñe en la paroesse de St. Martin," it is said, "Le Prévost du Roy doit par assemblage quattre oyes, nœuf poulles, trois poucins, et quarante œufs. Et est choisi par tour par les tenants du fief d'Orville" (of which St. John's is a part) "entre yceux." . . . "Greverie deubs par assemblages, et payables à la feste St. Paul coñe en St. Martin. Le Prévost du Roy de ceste paroesse 50 sols. 9 denrs." This appears to have been certified by the governor, the bailly, the justices and officers of the King, upon the report of twelve of the principal and best-informed men of each of the parishes of the island, sworn before the bailly and justices.

These rents, thus ascertained, appear to have been paid without question by the several successive Prévôts from that time to the present. It is to be observed that throughout the long period covered by the documents in this case no trace appears of any list of the persons from whom the rents, &c., were to be collected having been furnished by the Crown to the Prévôt, or demanded by him; and in the nature of things the knowledge as to who those persons liable to pay the rents, &c., from time to time were, would not be with the Crown, but would be with the Prévôt who is elected by the tenants, and whose duty it is, as appears from the extent of 1607, to certify all sales, and who by his oath of office is bound to declare all successions, forfeitures, &c., in the fief.

As the duty of the Crown to furnish this list is asserted by the respondent, and as no other question is raised by him, the total absence of proof of the sole fact on which he rests his defence, contradicted by the unvaried usage of the past, would be sufficient to dispose of the case: but their Lordships will briefly consider the evidence and the grounds upon which they understand the Royal Court proceeded.

The chief question is as to the meaning of the expressions "assemblement" and "Le Prévost du Roy doit par assemblage."

For the appellants it is contended that these phrases signify that the Prévôt is bound to pay to the Crown the gross amount of the rents "in solidum," whether or not he has collected in full the sums or dues which the said rents represented, and that they are due from the Prévôt as an undivided total, without regard to the individual contributions by which they are constituted.

In support of this contention the appellants rely on the fact that in the several extents in which these rents and dues are mentioned, they are stated to be owing from the Prévôt without any reference to the individual tenants, or holdings liable to contribute, and the uninterrupted payment by successive Prévôts during so great a length of time, without any question having been raised as to their liability, is referred to as strongly confirming the appellant's construction of the expressions "assemblement" and "doit par assemblage."

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On the other hand, no interpretation is put upon these words in the judgment appealed from, while it holds that every "Prévôt Receveur" (which the respondent is found to be) is bound to collect the rents from the vassals, and is in the first instance responsible for their non-payments. This obligation, however, is said to be conditional on the Seigneur furnishing the Prévôt with the list of rents and dues claimed before referred to.

Their Lordships are informed that the argument for the respondent in the Court below was mainly based on the case of the Marquis de Pirou, decided by one of the Courts of Normandy in the year 1693, that is, after the formation of the "Coutume Réformée" for Normandy in 1585.

This board has, on more than one occasion, pointed out that the "Coutume Réformée" and the commentaries on it, are not of any authority as to what was the law in force in Jersey before the final separation of the Duchy of Normandy from the Crown of England, which still remains the customary law of Jersey, although the "Coutume Réformée" and the commentaries on it may be referred to to assist in determining what the law was before the separation, in the same way as English decisions are referred to in American Courts upon questions of English common law.

In the case of the Marquis de Pirou, as stated in M. Houard's "Dictionnaire de la Coutume de Normandie" (ed. Rouen, 1782), it appears that the Marquis alleged that some Seigneurs (of whom he claimed to be one) had made concessions in gross to the inhabitants in general of their fiefs, who by consequence were bound in common for the payment of the dues, subject to the determination of the contribution of each in proportion to their holdings, and that for the collection of this contribution they were bound to name one of their number, who was, as their representative, bound to pay "à leur garantie" the total of the Seigneur's "droits."

The facts of the case do not appear; but the Court held that the Seigneur de Pirou had failed to establish by title this allegation. There is nothing to shew that the Seigneur de Pirou had been for a long course of years accustomed, as in the present case, to receive the rents, &c., of his fief from the Prévôt as due

from him "par assemblage"; no such expression occurs in the notices of the Marquis de Pirou's case.

Holding, as the Court did, that the Seigneur de Pirou had failed to give proof of his claim, it proceeded to lay down certain regulations or ordinances with regard to "Prévôtés Receveuses." Some of these regulations have been treated by the Royal Court as propositions of law applicable to the present case. They appear to have been adopted from the treatise of Flaust, in his work on the "Coutume et Jurisprudence de Normandie" (ed. Rouen, 1781), under the heading "Du Gage-Pleige, et du Service de Prévôté."

The material passages are as follows:—

"La Cour, par son arrêt" (in Pirou's case), "en déclarant la Prévôté Receveuse, ordonna—

"1°. Que tous les hommes et tenants d'icelle sont tenus de nommer chaque année des Prévôts bons et solvables, chacun en leur rang et degré, pour faire la recette des rentes et redevances, suivant le rôle et charge qui leur seront baillés par le Seigneur.

"2°. Que dans ce rôle et charge le Seigneur ne pourra employer que les rentes et redevances seigneuriales, exigibles et non contredites, dues par les anciennes fieffes de ladite seigneurie, et reconnues par les vassaux et employées dans les aveux où le service de Prévôté est avoué, ou justifiées par les recettes des comptes qu'en ont rendus les précédents Prévôts depuis quarante ans.

"4°. Qu'en cas de contredit de quelques-unes des rentes et redevances employées dans ledit rôle, le Seigneur de Pirou sera tenu d'y defendre sur la dénonciation qui lui en sera faite par ledit Prévôt-Receveur, qui en demeurera d'autant déchargé jusqu'à la vuide dudit contredit."

It is to be observed that the "rôle" which is referred to in these passages is one, not of the tenants, but of the "rentes et redevances exigibles et non contredits." The rents and dues in this case have never been disputed, and are proved not only by the extents, but by the receipts of former Prévôts for far more than the time prescribed in the Seigneur de Pirou's case.

But even assuming that the "rôle" there required was one containing the names of the tenants as well as the amounts due,

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there are considerations connected with the Norman tenures under the "Coutume Réformée" which are not applicable to the fiefs of Jersey. In Normandy there was a proceeding in Court called "Gage-Pleige," intimately connected with the office of "Prévôté," and treated together with it in the work of Flaust already referred to:—

"One of the objects of the 'Gage-Pleige'" (says Flaust) "is that the vassal may acknowledge the rent and service, and declare in particular the heritages for which they are due. This supposes (implies) that the vassals are bound to sign 'sur les gages-pleiges' their declarations or acknowledgments. . . . . The third obligation which is prescribed to the vassal is to declare in particular the heritages in respect of which the rents are due. This results from the words 'déclarer en particulier.' . . . . The last object of the 'Gage-Pleige,' indicated in art. 185, is to declare whether since the last 'aveu' the vassal has sold or acquired the heritage, and before whom the contract has been executed."

The "Gage-Pleige" therefore supplies the particulars which the lord is to furnish in the "rôle" to be given to the Prévôt. No such institution or proceeding as the "Gage-Pleige" is known in Jersey, while on the other hand, as has been already pointed out, it appears, from the extents and the oath of office taken by the Prévôt in Jersey, that he is bound to certify to the bailiff all sales of lands or rents sold within the King's fee, and to make known "any successions, forfeitures, denunciations, seizins, disseissins, and treasure trove." Thus, in Jersey it is the duty of the Prévôt to give that information which in Normandy it is the object of the "Gage-Pleige" to secure. Further, it appears on the records of the Royal Court that there is in Jersey a proceeding called "appériement," for the purpose of enabling the Prévôt to have any question as to the tenants, and the proportions of rent payable by them, determined. This is a judicial proceeding to which the Sovereign as Seigneur is not a party. By it the tenants are required to bring in the true measurement of their lands in the form of an "aveu," to be delivered into the hands of the Prévôt "pour procéder à un appériement des Prévôtés," and in case of default their lands

are liable to seizure. The "appériement" is signed on behalf of the Court "to serve as a guide for the future amongst the tenants of the fief."

There are other differences between the law of Normandy relating to Prévôtés and that of Jersey; but as these differences relate to matters not relevant to the present inquiry, it is unnecessary to touch upon them. The distinction also drawn between "Prévôtés Receveuses" and those called "Tournoyantes ou Commanderesse," and others, need not be discussed, as the Prévôté of St. John is admittedly "Receveuse."

For these reasons their Lordships are of opinion that the Crown has established its right to demand of the Prévôt personally the payment of the rents due in respect of the fief, whether or not he has received the contributions thereto of his co-tenants, and that there is no obligation on the part of the Crown to furnish the Prévôt with a list of the persons liable to him for contribution in respect of the said rents, and they will humbly advise Her Majesty that the judgment appealed from be reversed, and that judgment be entered for the Crown in the terms of the claim.

The respondents must pay the costs in the Court below, and also the costs of the preparation by the Greffier of the record and of the transcript forwarded by him to the Privy Council. There will be no costs of this appeal.

Solicitor for appellants: *Solicitor to the Treasury.*

[PRIVY COUNCIL.]

J. C.* 1892 May 26.

RAMSAY . . . . . Defendant;

AND

GILCHRIST AND OTHERS . . . . . Plaintiffs.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

27 *Eliz. c.* 4—*Voluntary Charitable Gifts—Subsequent Conveyance for Value.*

Held, that a voluntary gift for charitable purposes is not to be treated as covinous within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value.

APPEAL from a decree of the Supreme Court (Aug. 4, 1890) reversing a decree of the Primary Judge in Equity (Feb. 17, 1890).

The question in the appeal was whether a voluntary conveyance in trust for charitable purposes in connection with the Presbyterian Church in New South Wales was void under 27 Eliz. c. 4, as against a subsequent purchaser for value with notice of the voluntary conveyance.

By an indenture dated the 11th of August, 1869, one Sarah Ann Ramsay conveyed certain lands, mentioned in three separate schedules thereto, to the defendants David Ramsay and Margaret Ramsay, upon trusts to be declared, which trusts had for their general object the devotion of the lands mentioned in the second schedule to educational purposes, and the devotion of the lands mentioned in the third schedule to the purposes of a minister's dwelling in connection with the Presbyterian Church of New South Wales. A school had been erected on a portion of the land mentioned in the second schedule to the deed; but a minister's dwelling had not been erected upon the land mentioned in the third schedule to the deed. By an indenture dated the 12th of February, 1887, the said Sarah Ann Ramsay, in consideration of £500 alleged to be paid to her by her son the defendant,

* *Present*:—The Earl of Selborne, Lord Watson, Lord Macnaghten, Lord Morris, Sir Richard Couch, and Lord Shand.

John Simeon Ramsay, purported to convey to him 2A. 31P., being part of the lands which were included in the second and third schedules to the deed of the 11th of August, 1869, and it was admitted that at the time of the making of this conveyance John Simeon Ramsay was well aware that his mother had previously conveyed the said 2A. 31P. for the purpose of a school and a minister's dwelling.

Cozens-Hardy, Q.C., and *A. Young*, for the appellant, contended that the effect of 27 Eliz. c. 4 was to render the voluntary conveyance void in favour of the appellant on his obtaining a conveyance for value. It appeared from the judgment of the Full Court that their judgment would have been to that effect, but for 43 Eliz. c. 4, which had not been referred to in the hearing before the Primary Judge. But the later Act is not applicable to the colony at all. If applicable, it applies only to cases of a purchase from or through trustees holding for a charity, and not to a case like this where the voluntary settlor is also the vendor for value. Reference was made to *Doe* v. *Manning* (1); *De Mestre* v. *West* (2); *Harding* v. *Howell* (3); *Attorney-General* v. *Corporation of Newcastle* (4); Dart's Vendors and Purchasers, 6th ed. p. 1008; Sugden's Vendors and Purchasers, 14th ed. p. 719; *Trye* v. *Corporation of Gloucester* (5); *Gooch's Case*, Coke's Reports, 5th part, p. 60.

Crackanthorpe, Q.C., and *Serrell*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

THE EARL OF SELBORNE :—

Their Lordships have before them a very well-considered and able judgment of the Full Court, consisting of the Chief Justice and two puisne judges; and it might, perhaps, have been sufficient for their Lordships to say, that they are satisfied with that judgment, and with the reasons given for it; but they will

(1) 9 East, 71.
(2) [1891] A. C. 264, 267.
(3) 14 App. Cas. 307.
(4) 5 Beav. 307; 12 Cl. & F. 402.
(5) 14 Beav. 181.

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make a few observations upon the principal points raised in the argument.

Their Lordships have been told by counsel for the appellant, that they will for the first time be taking charitable gifts out of the statute 27 Eliz. c. 4, if they affirm the judgment appealed from. Had their Lordships heard counsel for the respondents, they would undoubtedly have been told that if they did otherwise they would for the first time be laying down the law that voluntary charitable gifts are within the statute of 27 Eliz. On which side does the argument from novelty preponderate? It seems to their Lordships that if for nearly 300 years since the passing of that statute, taking into account the great severity of its application by the Courts, there has been no example of its being applied to this particular class of cases, that is strong evidence to shew that it never was supposed so to apply; for the cases have been frequent in which the statute has been the subject of litigation and decision; charitable gifts have also been extremely frequent; and there might very often have been motives for seeking to defeat such gifts in the lifetime of the donor, if that had been understood to be law.

Their Lordships cannot help thinking that the reason why there has been no decision on the subject up to the present time, is because no person supposed that the statute did apply to such a case. In the absence of any such decision, the first duty of a Court is to consider what the statute says; and on the face of it their Lordships think that no reasonable person would suppose it to apply to charitable gifts; not only because it would be a very strong proposition to suggest that all voluntary gifts to charities are primâ facie fraudulent and covinous, but because it appears on the face of the statute that all persons who might be parties to the gifts comprised under the words "covinous and fraudulent" are treated as wrong-doers, who may be penally proceeded against.

The third section of the statute makes any one who maintains a title under such a conveyance liable to forfeit "one year's value" of the property in question, and also to suffer "imprisonment for one half year, without bail or mainprize." It would be extravagant to suppose that all trustees of voluntary charities

maintaining their title were meant by the Legislature to be treated as wrong-doers in that sense. All the subsequent decisions have reference to cases where no public interest was in question. Where two circumstances were found united, an original voluntary gift to a private person, and then a contrary and inconsistent sale by the author of that gift, the judges, straining the language of the statute, raised from those circumstances a presumption of the fraudulent intent struck at by the statute. Though those decisions might not commend themselves to their Lordships if the matter were new, it is necessary for them to adhere to the law, now so well established. Would it, however, be reasonable, without any precedent or authority for the application of that law to charities, now, for the first time, after a lapse of nearly 300 years, to make such a precedent? Their Lordships think that it would not be reasonable, bearing in mind that, under a strained interpretation of the statute, a presumption of what the statute calls fraud and covin was made in the cases to which the authorities do apply. In this case the presumption is the other way. The presumption, which there is nothing in those authorities to repel, is, that a charity is charitable and not fraudulent, and therefore primâ facie not to be treated as covinous. It is in the last degree improbable, that, either at the time when the statute 27 Eliz. c. 4 was passed, or during the sixteen years which elapsed between that time and the passing of the statute 43 Eliz. c. 4 any such view was or could have been taken of gifts given to charities as would bring them primâ facie within the earlier statute.

But the matter does not rest there; because it is impossible to doubt that it was the intention of the Legislature, when passing the statute 43 Eliz. c. 4, to recognise as good and valid all charitable gifts which were not taken out of that statute by the provisoes contained in it, relating to purchasers for valuable consideration. If there had been no exceptions made, the statute would have operated upon all voluntary gifts for charitable purposes, shewing that in point of law they were presumed, not to be covinous or fraudulent, but the reverse. Of course, there might be an actual fraud taking the form of a pretended gift to charity. With that their Lordships have nothing to do; but in

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the absence of any evidence of actual fraud, all charitable gifts, without exception, voluntary or not, were treated by that statute as proper to be protected by law. Various cases were excepted from the statute. One of them was the case of a man who had purchased "upon valuable consideration of money or land, any estate or interest of, in, to, or out of, any lands . . . given, limited, or appointed to any the charitable uses above-mentioned, without fraud or covin, having no notice of the same charitable use." If, therefore, the purchaser, though for value, had notice of the charitable use, the purchase was not taken out of the statute, but was to be treated as a valid gift to charity within the protection and provisions of the 1st section; and that proviso was absolute, without reference to the manner in which the purchaser had purchased, or to the person from whom he purchased, whether the case might be that of a conveyance by the original grantor, or by a trustee breaking his trust. The succeeding words, dealing with the persons by whose act in making a conveyance to a purchaser for valuable consideration without notice, the charity might lose the lands, made those persons liable to pay the value to the commissioners or to the charity. So far from treating the charity as one which can be avoided by the donor for his own benefit, the enactment is, that when the purchaser without notice is safe, the persons who put him in that situation are, as far as they can, to make good the loss to the charity. It was suggested that this applied only to breaches of trust by trustees. Their Lordships find nothing in the words of the statute which can lay any sufficient foundation for that argument. The latter part of the section relates, not only to a person who "being put in trust hath or shall break "the same trust," but to any one who shall do so, "having notice of the charitable use "above-mentioned;" and again, not only to one who "shall break the same trust," but to any one who shall defraud the same uses, by any "conveyance, gift, grant, lease, demise, release, or conversion whatsoever."

Their Lordships think that if before the passing of the Act of 1601 the earlier statute could have been held to strike at gifts to charitable uses, the subsequent statute would for the time to come have prevented such a construction. But the subsequent

statute is cogent evidence that the earlier statute was never so intended or understood.

Their Lordships will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss the appeal with costs.

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Solicitors for appellant: *Walker, Martineau & Co.*
Solicitors for respondents: *P. J. Gordon & Son.*

[PRIVY COUNCIL.]

BOYER . . . . . APPELLANT;

AND

THE BISHOP OF NORWICH . . . . RESPONDENT.

J. C.* 1892 *May* 18, 28.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

13 *Anne*, c. 13—*Nomination by Roman Catholic Patron—Void Presentation.*

Held, that a presentation to a benefice made by a college, on the nomination of a Roman Catholic patron, and appearing on the face of it to have been made, not in right of the college, but in trust for the Roman Catholic, was absolutely void under 13 Anne, c. 13.

APPEAL from an interlocutory decree of the Official Principal of the above Court (Nov. 25, 1891), whereby he rejected the appellant's libel in a cause of duplex querela (1).

Sir *W. Phillimore*, Q.C., and *Kempe*, for the appellant, contended that the decree was wrong. It was immaterial that Sir A. Dixie was a Roman Catholic, for his nomination was not a nomination within the meaning of 13 Anne, c. 13, s. 1; which meaning ought not to have been extended beyond that to which in terms it was restricted in 3 Jac. 1, c. 5, and 1 Wm. & Mary, c. 26. Such nomination must be coupled with the subsequent presentation by the college, and taken together there was neither

* *Present:*—THE LORD CHANCELLOR, THE EARL OF SELBORNE, LORD WATSON, LORD HERSCHELL, and LORD SHAND. *Ecclesiastical Assessors:*—THE ARCHBISHOP OF CANTERBURY, THE BISHOP OF GLOUCESTER AND BRISTOL, AND THE BISHOP OF HEREFORD.

(1) See [1892] P. at p. 41.

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nomination nor presentation by a Papist within the meaning of the Act. The appellant's fitness, within the meaning of the statutes of the college, is not denied. [THE ARCHBISHOP OF CANTERBURY:—Would not the right to give or withhold presentation carry with it a jurisdiction to decide fitness? LORD SHAND:—The objection is that, assuming fitness, there was a void nomination.] Nomination in Queen Anne's time meant something different from nomination now. See the old cases on nomination: *Hare* v. *Bickley*, decided in 28 Eliz. (1); *Sherley* v. *Underhill* (2), decided in 16 Jac. 1; Phillimore's Eccl. Law, p. 348; Watson's Complete Incumbent, 4th ed. 1747, c. 15; *Rex* v. *Marquis of Stafford* (3). As respects the disability of Roman Catholics, see 3 Jac. 1, c. 5, s. 13; 1 Wm. & Mary, c. 26; 13 Anne, c. 13; 11 Geo. 2, c. 17, s. 5. Even if the nomination was void, the presentation by the college at the date when it was made was a good presentation in its own right.

Dibdin, and *Hansell*, for the respondent, were not heard.

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The judgment of their Lordships was delivered by

THE EARL OF SELBORNE:—

The question in this appeal is, whether the presentation of the appellant to the benefice of Brantham, in the diocese of Norwich, made by the master, fellows, and scholars of Emmanuel College, Cambridge, on the 22nd of November, 1890, was void under the statute of the 13th year of Queen Anne, c. 13. If so, the respondent, the Bishop of Norwich, was not only justified in his refusal to act upon it, but he had no option to do otherwise; for not only any presentation, but any admission, institution, and induction to be made thereon is by the statute (in the cases to which it applies) rendered "utterly void and of no effect, to all intents, constructions, and purposes whatsoever."

The statute makes "every Papist, or person making profession of the Popish religion," and every "mortgagee, trustee, or person anyways intrusted, directly or indirectly, mediately or immediately, by or for any such Papist or person . . . . incapable to

(1) Plowd. 526 a, 529. (2) Sir F. Moore's Cases, 894.
(3) 3 T. R. 646; S. C. 3 Ves. 77.

present, collate, or nominate, to any benefice, prebend, or ecclesiastical living, school, hospital, or donative"; and it gives his right of presentation, &c., to one of the Universities of Oxford and Cambridge. The presentation of the 22nd of November, 1890, appears, on the face of it, to have been "on the nomination of Sir Alexander Beaumont Churchill Dixie, baronet," who (though it does not so appear on the face of that instrument) is admitted to have been a Roman Catholic. He was heir of Sir Wolstan Dixie, the founder of certain fellowships and scholarships in the college; and, as such heir, he would have been entitled, under a decree made by Lord Keeper Wright, to certain rights of nomination to those fellowships and scholarships, or exhibitions (or some of them), and to some of the benefices in the gift of the college, if new statutes had not been made, by the authority of Parliament, for the college and for the Dixie Foundation, in the year 1880. By those new statutes, all the prior rights of the heir of Sir Wolstan Dixie were abolished, with the reservation only (contained in the 3rd clause) to the heir for the time being, of "the perpetual right of nominating to the college a fit person" to each of three rectories, of which Brantham was one, subject to provisoes—(1.) that each person so nominated should be a graduate of Emmanuel College, who should either be of the kin of Sir Wolstan Dixie, or have been educated at Market Bosworth School; and (2.) that the nomination should be communicated in an attested form to the master of the college within three calendar months of the voidance of the benefice to which it referred. If there should be no such nomination within three calendar months, the benefice, for that turn, was to be subject to the rules of nomination and presentation which applied to the benefices in the general patronage of the college.

The rectory of Brantham became vacant in June, 1890, and in the following month Sir Alexander Beaumont Churchill Dixie, by writing under his hand (duly communicated to the master of the college), nominated the appellant, to be presented by the college to the benefice so vacant. The appellant was a fit person, and had the qualifications required by the statutes of 1880.

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The question of the nature of the right of Sir Wolstan Dixie's heir must be determined in the same way as if he had not been a Roman Catholic, in order to see whether it does or does not come within the provisions of the Act of Queen Anne. So considered, it was, upon the nomination in due time of a person properly qualified, an absolute legal right, to which the college (but for the statute) would have been absolutely bound to give effect, excluding all exercise of discretion on their part. If there had been no conditions, the case would have been, in their Lordships' judgment, undistinguishable from those cited by Sir Walter Phillimore, in one of which an advowson was vested in an abbot and convent, subject to the right of a stranger to the convent and his heirs to nominate the clerk to be presented; and in the other in a lay rector, holding under a Crown grant made on the dissolution of the monasteries, subject to a similar right of nomination. The person who had such a right of nomination was held to be the real patron, and those in whom the legal title to the advowson was vested were held to have no more than a ministerial duty to perform: a doctrine in accordance with good sense and the substance of the case, and recognised by modern authorities on ecclesiastical law. In their Lordships' judgment, it makes no difference in principle that the presentee must have (besides the ordinary qualification of fitness) some special qualification, and that the nomination must be made within a limited time, leaving the right of presentation absolute in the college if this is not done. If the conditions are complied with within due time, the right of the nominator to have his nominee presented is not less absolute than if it had been from the first unconditional. The Act of Queen Anne operates upon the rights to which it is applicable, in favour, not of any patron, but of one or other of the Universities of Oxford and Cambridge.

Their Lordships agree with the learned Dean of Arches, that this is a right upon which the statute does operate. It was argued, that in the earlier Acts of 3 Jac. 1, c. 5, and 1 Wm. & Mary, c. 26, the only rights of "nomination" struck at, eo nomine, were rights "to nominate to any free school, hospital, or donative whatsoever," which would not apply to such a case as this; and that the same words in the Act of Queen Anne (in pari materiâ,

referring to the earlier statutes, and expressed to be in furtherance of the same policy) ought to receive an equally limited construction. If it had appeared to their Lordships that the decision of the present appeal ought to depend upon the words "*nominate*" and "*nomination*," as used in the Act of Queen Anne, they might probably have desired to hear that point fully argued on both sides before coming to a conclusion upon it. But there are other words in the Act of Queen Anne (not found in the earlier Acts), which go directly to the presentation by the college, and not merely to the nomination by the heir of Sir Wolstan Dixie. If the master, fellows, and scholars of Emmanuel College were, as to the presentation to the benefice of Brantham under the circumstances of this case, "intrusted, directly or indirectly, mediately or immediately," for Sir Alexander Beaumont Churchill Dixie, *they* were (as long as that obligation continued, or would have continued if Sir Alexander had not been a Roman Catholic) incapacitated to present. Their Lordships are of opinion that the college was so "intrusted" within the meaning of the statute.

It is no part of their Lordships' duty to enter into any question which may arise between the University of Cambridge (to whom the Act of Queen Anne gave the right of patronage from the exercise of which, directly or indirectly through the college, the Roman Catholic heir of Sir Wolstan Dixie was disabled) and Emmanuel College. It must be understood that, if any such question should arise, its decision (except so far as depends upon the application of the statute to this case, and the consequent avoidance of the presentation which has been made) is to be regarded as unprejudiced by anything which has been said.

There was a contention (of which their Lordships may shortly dispose) that the presentation of the 22nd of November, 1890, having been made after the lapse of three months from the occurrence of the vacancy in the benefice of Brantham, ought to be taken as made by the college in its own right, and not in right of Sir Alexander Beaumont Churchill Dixie. Their Lordships think it unnecessary to enter into any question which that argument might possibly raise beyond what appears on the face of the presentation itself. That presentation, on the face of it, is made on the nomination of Sir Alexander Beaumont Churchill

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Dixie, and therefore not by the college as in its own right. If the absolute right of patronage had become vested in the college for want of a nomination by any person entitled to nominate within three months from the vacancy, their right would have been to present, not on the nomination of Sir Alexander Beaumont Churchill Dixie, but in accordance with "the same rules of nomination and presentation as apply to the benefices in the general patronage of the college." This, it is clear, they have not done. Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal with costs.

Solicitors for appellant: *Wild & Wild.*
Solicitors for respondent: *Brooks, Jenkins & Co.*

[PRIVY COUNCIL.]

J. C.* 1892, *May* 19.

Ex parte DEEMING.

ON APPEAL FROM THE COLONY OF VICTORIA.

Practice in Criminal Cases—Petition for Special Leave to Appeal.

Her Majesty will not be advised to grant leave to appeal in criminal cases, where it is not even suggested or surmised that substantial and grave injustice has been done, either through a disregard of the forms of legal process, or by some violation of the principles of natural justice.

THIS was a petition by Deeming, a prisoner under sentence of death at Melbourne, in Victoria, praying for such order and relief as Her Majesty might think fit, and that the sentence might be respited pending his appeal. It was treated as a petition of special leave to appeal from the decision of a specified criminal court.

It alleged a conviction on the 2nd of May, 1892, after trial at Melbourne, for the murder of Emily Mather, at Windsor, near Melbourne, about Christmas last; that the conviction was against

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HERSCHELL, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH and LORD SHAND.

evidence; that the petitioner was and is insane; that there was no fair trial or time for defence. It further alleged that important statutory declarations to the effect that he was insane were on the way to Melbourne, but would not arrive before the date fixed for execution; that there were many important facts which could not be inserted in the petition until further instructions were received from Australia; that the medical evidence of insanity was incomplete at the trial, but that his insanity had since been confirmed.

Geoghegan, and *Lawless*, for the petitioner.

The judgment of their Lordships was delivered by the

LORD CHANCELLOR:—

The application in this case assumes a twofold character. One form of it is that there are certain affidavits containing additional evidence which are on their way from this country to the Colony, which might induce the Colonial authorities there to advise Her Majesty to exercise her prerogative of mercy. That is a question with which this Committee has no concern.

The other part of the application appears to apply itself to the right which Her Majesty possesses of setting right any clear departure from justice in the administration even of the criminal law in a colony. But that right, to whatever extent it exists, has been in the ordinary and usual practice of this tribunal confined within certain limits. In the case of *Abraham Mallory Dillett* (1), the following passage occurs, which their Lordships here agree to: "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

Now, it was impossible here not to see that, in the application which has been made with great decorum and propriety by the learned counsel, there is nothing suggested or surmised, and

(1) 12 App. Cas. 467.

J. C. 1892 *Ex parte* DEEMING.

certainly nothing actually verified by affidavit of any person familiar with the facts themselves—because the distance from the Colony would, no doubt, render that difficult to obtain—which brings it near any of the cases in which this Board has thought it right to interfere with the administration of criminal justice. On the contrary, so far as can be gathered from what is surmised, it is a question as to whether or not the evidence was sufficiently convincing to the minds of the jury, under the direction of the learned judge, upon the question of the guilt or innocence of the prisoner, including in that proposition the allegation that he was not responsible for his actions. It is impossible, therefore, to suppose that any such application as the present one could be successful. If it were, it would be easy for any person in any distant colony to stay execution and, which would be a very serious and grave misfortune, to interpose a long delay between the vindication of justice by a verdict and execution of the sentence, simply by sending over such materials as are suggested to be the sole foundation for argument here.

Under these circumstances, their Lordships have not the smallest doubt, and will so humbly advise Her Majesty, that this is not a case in which leave to appeal ought to be granted.

Solicitors for appellant: *Wilson & Wallis.*

[PRIVY COUNCIL.]

SMART . . . . . PETITIONER; J. C.*

AND 1892

SMART . . . . . RESPONDENT. *July* 15, 30.

ON APPEAL FROM THE COURT OF APPEAL, ONTARIO.

Husband and Wife—Custody of Children—Paternal Authority controlled by External Considerations.

On the application of a husband against his wife for a writ of habeas corpus in respect of their three children, two of them being above twelve years of age, and therefore not within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children apart from him; that after the second separation he publicly and falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income:—

Held, that the Courts below exercised a right discretion in discharging the writ and remanding the children to the custody of their mother.

The father's legal power was controlled, as to the youngest child, by a statute which gave absolute authority to the Court; it was materially affected as regards the other two by breach of marital duty, by consideration with respect to their welfare, and the objection to separating them from each other.

APPEAL from an order of the Court of Appeal (May 12, 1891), confirming an order of Ferguson, J. (Feb. 25, 1890), to the effect that the infant children of the above-named parties should be remanded to the custody of the respondent to remain in her care and custody until further order; the respondent undertaking to maintain and educate them in accordance with the religion of the Church of England, not to remove them beyond the jurisdiction without the Court's order, and to provide for the appellant's access to them.

The facts are stated in the judgment of their Lordships.

* *Present:*—Lord Watson, Lord Hobhouse, Lord Morris, Sir Richard Couch, and Lord Shand.

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The decision of the Court of Appeal was by a majority.

Hagarty, C.J., held that the Statute of Canada, 18 Vict. c. 126 (which is similar in its terms to Serjeant Talfourd's Act, 2 & 3 Vict. c. 54, except that by the Canadian statute jurisdiction over the child is given up to the age of twelve instead of seven years), applied to the case, inasmuch as one of the children was then under the age of twelve years, that the point to be considered was the interests of the children, and that Ferguson, J., had exercised a discretion in the matter which should not be interfered with. He also expressed an opinion that the covenants of the husband as to the custody of the children contained in previous deeds of separation were an answer to the application. Osler, J.A. (with whose opinion Meredith, J., concurred) agreed in the conclusion arrived at by Hagarty, C.J., upon the ground that the Court had an absolute discretion in the matter which should be exercised exclusively in the interests of the children. Burton, J.A., the dissenting judge, held that both in 1883 and 1885 the respondent left her home without any legal justification, that a covenant on the part of the father agreeing to give up the right to the custody of his children was not binding in law and could be revoked, and that no case was made out under the statute for interference with the rights of the father. He held that the statements elicited from the appellant in cross-examination did not amount to cruelty on his part, nor to such unfitness as would justify the Court in interfering with his rights as a father.

Rigby, Q.C., *Kerr*, Q.C. (of the Canadian bar), and *Gore*, for the appellant:—

The appellant, being the father of the children, has a legal right to their care and custody. His misconduct is not of that character and degree which entitle the Court to disregard that legal right and practically declare that he has forfeited it. The Canadian statute 18 Vict. c. 126 is not applicable at all; certainly not to the two elder children who are above the statutory age. If it applies it does so only in the case of the youngest of the three children until it attains the age of twelve. The evidence was discussed, and the nature of the charges made by the appellant against his wife, the circumstances under which

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they were made, and the alleged sufficiency thereof to establish a case for depriving him of the custody of his children, were investigated. Upon the extent of the father's legal power and the grounds on which the Court will interfere with it reference was made to *In re Agar Ellis* (1); *Re Fynn* (2); *Warde* v. *Warde* (3); *Re Spence* (4); *Re Halliday* (5); *Rex* v. *Greenhill* (6); *In re Taylor* (7); *Elderton's Case* (8); *Wellesley* v. *Duke of Beaufort* (9); *In re Goldsworthy* (10); *Symmington* v. *Symmington* (11).

Sir *H. Davey*, Q.C., *Blake*, Q.C. (of the Canadian bar), and *Lawrence*, for the respondent, were not heard.

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July 30.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This case belongs to a class in which Courts of justice have repeatedly expressed their reluctance to interfere, by reason of the great difficulty of knowing what arrangements are best for a family where the normal family arrangements have been disturbed, and yet in which interference is sometimes found necessary to prevent injury to wives or children. Their Lordships approach it with a strong sense of the delicacy of the jurisdiction, though the facts are such as to leave no material doubt of the duty which lies upon them.

The appellant and respondent are husband and wife. They were married on the 4th of June, 1874. There are three children of the marriage: a girl, born on the 10th of April, 1875; another girl, born on the 19th of July, 1877; and a boy, born on the 13th of October, 1880. Up to the year 1883 the family resided at Port Hope, a town in Ontario, where the husband practised as a solicitor and barrister.

In July, 1883, the wife left her home, taking her children with her, to take up a residence in Toronto. She had then, and has, a handsome fortune in possession, and a larger one in

(1) 24 Ch. D. 317, 337.
(2) 2 De G. & Sm. 457.
(3) 2 Ph. 786.
(4) 2 Ph. 247.
(5) 17 Jur. 56.
(6) 6 Nev. & M. 244; S. C. 4 A. & E. 624.
(7) 4 Ch. D. 159.
(8) 25 Ch. D. 220.
(9) 2 Russ. 1.
(10) 2 Q. B. D. 75.
(11) Law Rep. 2 H. L., Sc. 415.

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expectancy. The reason she assigned for leaving her husband's roof was habitual intoxication on his part, and the many distressing incidents common to such a habit.

Negotiations took place between the parties and their friends for a resumption of the family relations, and on the 2nd of May, 1884, a written agreement was signed by the husband and wife, in pursuance of which the wife returned home to Port Hope.

The recitals of the agreement are as follows:—

"Whereas unhappy differences have arisen between the said David Smart and Emilie Ardelia Smart.

"And whereas the said David Smart and Emilie Ardelia Smart have been living separate and apart for some time on account of such unhappy differences.

"And whereas the said unhappy differences have arisen from the habits of intemperance of the said David Smart.

"And whereas the said David Smart has determined to abandon such habits, and in consideration of that and for the other causes and considerations in this instrument mentioned, the wife of the said David Smart, Emilie Ardelia Smart, has agreed to return and live with him the said David Smart."

It was then agreed that the wife should advance 8000 dollars to pay the husband's debts, and that she should out of her own estate maintain the household and family at Toronto; that if at any time thereafter the husband should again give way to intemperate habits, the wife should be at liberty to live apart from him, and should have the exclusive care of the children, under the obligation to maintain them; and that the husband should convey to the trustees of a previous settlement of land owned by him, other property described as the remainder of the property owned by him and adjacent to the land already conveyed.

In October, 1884, Mr. and Mrs. Smart went to California for a visit of some duration; and when there, the husband, who appears to have kept himself sober in the meantime, relapsed into drunken habits. Arrangements were made for their return to Toronto; but when the moment arrived the husband did not appear, being in fact too drunk to travel, and the wife journeyed back to Toronto in the company of a relative. This took place in September, 1885.

The wife then instituted a suit to have the care of the children secured to her according to the agreement of May, 1884, and that led to a second agreement, which was made on the 23rd of November, 1885. That agreement was stated to be supplemental to the earlier one, and it recited that, under the terms of the earlier agreement, the wife claimed the possession of her three children, and that the husband had requested her to give him a covenant as to her dealing with them. The wife thereupon covenanted to maintain and educate the children at her own expense, with provisions for their religious training and for their residence in Toronto, and for the husband's access to them.

In June, 1886, the husband applied for a writ of habeas corpus in respect of the three children, which the wife resisted. In the course of the proceedings it was arranged that the husband should also present a petition for the custody of the children, and that the questions in both proceedings should be tried simultaneously. A great quantity of evidence was gone into, and in the course of it the husband made some charges against his wife which had great influence on the decision of the case. It appears that in April, 1884, he had hinted at his wife's unchastity without any specific charge, and in a letter written to the wife's solicitor in June, 1886, he said that she had confessed to having married him by fraud, and for her own base purposes, and suggested that she herself was the cause of the trouble. In April and May, 1887, he entered into more detail. A medical lady, Mrs. Ballard, who had attended the wife, was then under examination, and the husband put to her several questions to shew that his wife had contracted depraved habits. This he did against the protest of the wife's counsel. He insisted, too, that his drunken habits were not the only cause of her leaving him, as stated in the agreement of May, 1884, but that there were other causes. When he came under cross-examination in October, 1887, the wife's counsel insisted on knowing what he meant by his several insinuations; and he then made specific and detailed allegations, which, if true, would shew that his wife was a person of abnormal depravity. In that condition the cause came on to be heard before Ferguson, J.

That learned judge found, without hesitation as he says, that

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the charges so introduced had no foundation in fact, and that the wife's answer to the petition had been proved. He held that the husband had made it impossible for his wife to live with him again, and that he had been guilty of cruelty. He ordered that the writ of habeas corpus should be discharged with costs, and that the three children should be remanded to the custody of the wife, with provisions for their education and residence, and for the husband's access to them.

The husband appealed. In his reasons for appeal, he seeks to deaden the effect of his accusations which had so recoiled upon him, by saying that he had not set them up on his application for the writ of habeas corpus, and that the only occasions on which he had mentioned them were privileged.

Three judges of the Court of Appeal accepted the findings of Ferguson, J., on the matters of fact in issue. They therefore held that the wife was not in fault, and that after the accusations her husband had made against her, she could not be expected to live with him again. They felt difficulty in saying that his drunken habits, which on the evidence he was shewn to have abandoned, were by themselves a justification for depriving him of his children; but, having regard to his false accusations, they had no difficulty in affirming the judgment of the first Court. Burton, J., who was the fourth judge, took a different view. He considered that the wife was not justified in leaving her husband on account of his drunkenness. With respect to his accusations, the learned judge thought it unnecessary to express any opinion as to their truth or falsehood; but he declined to hold that evidence given by the husband in a Court of justice, especially when elicited by the wife's counsel, should be regarded as an act sufficient to warrant the Court in refusing to give the custody of his children to him. The result was that the husband's appeal was dismissed.

Their Lordships may say at once that they cannot concur in Burton, J.'s, view of the husband's conduct. They cannot understand why accusations made on oath in a Court of justice should, irrespectively of their truth or falsehood (as to which the learned judge does not inquire), be treated with more indulgence than accusations made elsewhere, unless the accuser is in duty bound

to make them. Here the husband had no duty to make them. It is true that, if he did not, the vague and dark insinuations he had previously thrown out would be taken as groundless, and would tell against him; but that is the position in which a man places himself by throwing out insinuations which he must substantiate or withdraw. He might have withdrawn these, or he might have said that he preferred to be silent on the subject. He did prefer to support his insinuations by detailed statements which have been found to be false. Being false, the occasion on which they were made, so far from palliating his offence, aggravates it.

The law applicable to the case is the common law of England, as modified by a statute framed on the principle of what is known as Serjeant Talfourd's Act. It is thereby enacted that the Court may, if it sees fit, on the petition of the mother of an infant in the custody of its father, make order for the delivery of such infant to the petitioner, to remain in her care and custody until such infant attains the age of twelve years. In this case it was the mother who had possession of the children, and the father who was seeking to get it; but the Court considered, and rightly, that the result ought to be the same as if the parts were reversed.

On the 22nd of June, 1886, when the writ of habeas corpus was sued out, all the children were under twelve years of age. On the 25th of February, 1890, when Ferguson, J.'s, order was made, the two girls were more than twelve years of age. The boy has not quite attained that age at the present moment. Therefore, when the two orders below were made, the large discretion given by statute existed only in relation to the boy. The girls had to be dealt with under the common law, in which their Lordships mean to include the ordinary jurisdiction of the Court of Chancery.

Their Lordships have been very much pressed, as the Courts below were, with broad judicial statements of the father's legal power over his children, and of the amount of misconduct which it requires to induce the Court of Chancery to interfere with him. Their Lordships are disposed to think that the facts of this case are such that, even if it had occurred early in this

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century, the Court would have been induced to give the custody of the children to their mother. But they remarked during the argument, and wish to remark again, that no one has stated or can state in other than elastic terms the grounds on which the Court should think fit to interfere. There must be a sufficient amount of peril to the welfare of the children. But that sufficient amount can hardly be fixed for one age by the standard of another. Drunkenness, for instance, is looked upon as a much graver social offence now than was the case two or three generations ago, and its effect upon the welfare of a family must be judged of accordingly. For many years the tendency of legislative action and of judicial decision, as well as of general opinion, has been to give to married women a higher status both as regards property and person; and, in family questions, to bring the marital duty of the husband and the welfare of the children into greater prominence; in both respects diminishing the powers accorded to the husband and the father. This change must necessarily affect the views of judges upon the welfare of families when they are called on to exercise their discretion; or, what is not a very different thing, to decide what is sufficient cause for taking children out of the custody of the father.

The case of *Fynn*, before Knight Bruce, V.C., in the year 1848 (1), was much relied on both in the Courts below and at this Bar. Viewed as a decision, that case cannot be said to afford any guidance. The petition presented, not under Talfourd's Act, in the names of the infant children by their grandmother as next friend, and supported by their mother, was dismissed. But the reasons of the Court, as reported, leave it in doubt whether it was dismissed merely for the practical reason that the grandmother and mother had not the means of supporting the children, or because the Vice-Chancellor thought ultimately, after two adjournments, that the very strong grounds, which he stated with great force, for taking the children out of the custody of the father, were not strong enough to prevail against his legal powers, which he stated also with great force; or because the parties, having had the serious difficulties on both sides clearly exhibited to them, were weary of the dispute. Viewing the

(1) 2 De G. & Sm. 457.

report as an exposition of the law by a very eminent judge, their Lordships do not dissent from the terms in which the legal position of the father, apart from statute, is stated. But it seems to them that the Vice-Chancellor, while acknowledging that the effect of Talfourd's Act ought to be considered, has not stated its effect in any adequate manner.

In the next year, the case of *Warde* v. *Warde* (1) was decided by Lord Cottenham, and it illustrates both the direct and the indirect effect of Talfourd's Act. There the wife had left home, taking her children with her, on account of her husband's misconduct. He applied to the Court to have the children delivered up to him, which Shadwell, V.C., ordered to be done. There were four children, two above and two under seven years of age, which was the line drawn by Talfourd's Act. On appeal, Lord Cottenham pointed out that the Court had now an absolute authority over the younger children, and a larger power over the elder than it possessed when *Wellesley* v. *Duke of Beaufort* (2) was decided. Afterwards he said: "Children are by nature entitled to the care of both their parents; but when the conduct of one or both of the parents has been such as to render it impossible that they can live together, and the Court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, all that it can do is to adopt that course which seems best for the interests of the children." He then decides as to the eldest child, a girl of eleven, that she is likely to be injured by remaining with her father. As to the next, a boy of nine, Lord Cottenham thinks it unnecessary to decide whether, if that boy stood alone, he ought to be removed from his father's custody, because he says: "When I am compelled on such a ground to take one child from its father, I must not accompany that measure with the great evil and danger to the children of separating one portion of the family from the other." As to the younger ones, he repeated that "the Court has an absolute control over them, without regard to the peculiar common law right of the father to the custody of all his children." The result was, that all the children were given to their mother.

(1) 2 Ph. 786.

(2) 2 Russ. 1.

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Independently of the principles explicitly laid down in this case, it shews how inevitably a change of law brings about a further change in the mind of the judge on such a subject as the welfare of families. If the Court, having a discretion in the case of younger children, decides to remove them from their father, that must influence its judgment with respect to older ones, because it brings in the question whether it is right to break up the family by separating brothers and sisters.

In the *Case of Halliday* (1), decided in the year 1852, the wife petitioned under Talfourd's Act for the custody of a child four years old. The particular decision is not so important as the instructive way in which Turner, V.C., expounds the law, and which is frequently referred to. He specifies three main features as belonging to Talfourd's Act. First, it does not destroy the father's common law right, but assumes it, and introduces new elements and conditions under which it is to be exercised; secondly, it connects his right with his marital duty, and imposes the marital duty as the condition of recognising the paternal right; thirdly, it regards the interest of the child. And he founded his judgment in favour of the wife on the husband's breach of marital duty.

These principles were restated by Sir George Jessel in the year 1876 in the *Case of Taylor* (2), and applied to the Act of 1873, which extended the power of the Court to all children under sixteen.

In the *Case of Elderton* (3), Pearson, J., considered that there was no ground for depriving the father of his children independently of his behaviour to his wife; but, as he had been guilty of a breach of marital duty, and had made it impossible for the children to have the care of both parents, the mother was entrusted with the care of them.

In the present case we have the following circumstances: The wife has twice left her husband, taking her children with her, on account of his habitual intoxication, with its disgusting incidents and degrading example. On each occasion he agreed that she should maintain and educate the children apart from him; and

(1) 17 Jur. 56.
(2) 4 Ch. D. 157.
(3) 25 Ch. D. 220.

though those agreements are not enforceable against him by the law of Ontario, they serve to shew the then opinion of himself as well as others as to the arrangements which were most fitting under the circumstances. Since the second separation he has, to all appearance, irrevocably broken up the family by falsely alleging against his wife charges so injurious that she cannot be expected ever to live with him again. And the wife has ample means to bring up and provide for the children, while the husband has only a very narrow income.

All the authorities above cited from *Warde* v. *Warde* (1) downwards apply to the case of the boy who was born in October, 1880, and leave no doubt that in committing him to the care of his mother the Court below did what was strictly legal, as well as what was expedient for him and just between husband and wife.

As to the girls, it is true that the cases before Sir George Turner, Sir George Jessel, and Pearson, J., all related to children under the age specified by statute. But, as intimated above, it is probable that even prior to the passing of Talfourd's Act, in such a case as this, the children would not have been left in their father's care. How can there be any substantial doubt about it now? It has been shewn that Talfourd's Act at once introduced a new class of considerations when some of the children are below and some above the statutory age. But besides this, the course of legislation shews distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive, and that the welfare of the children required that it should be cut down. That was done here in 1839 by Talfourd's Act, which gave to the Court a discretion, judicial no doubt, but still a very large discretion, over children less than seven years old. The sense of the community was so satisfied of the benefit of the change, and also of its insufficiency, that in 1873 the limit of seven years was raised to sixteen. In Ontario it has been fixed at twelve. But it is impossible to measure by arbitrary limits of age the change of view which underlies the positive legislation. That change must also affect the question what is required for the welfare of the older children when their father's

(1) 2 Ph. 786.

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misbehaviour has made it impossible that they should have the care of both parents. A judgment on such a question always was and must be in its essence a discretionary judgment, viz., one guided by views on social and domestic matters absolutely incapable of being brought under legal rules and definitions. Doubtless it is exercised within stricter limits and under greater pressure than in cases when the legislature has in express terms given a discretion. Their Lordships are now acting under that pressure. But the welfare of a family is powerfully affected by the opinion of relatives, friends, and neighbours, which no judge has a right to disregard; and that opinion will be the opinion of the day, not of a bygone day. And whatever might have been the view taken prior to the year 1839, it is quite impossible at the present day to say that under such circumstances as are disclosed by the present case it would not be seriously prejudicial to the children to take any of them away from their mother in order to place them in the custody of their father.

The result is that the appeal fails; and their Lordships will humbly advise Her Majesty to dismiss it. The appellant must pay the costs.

Solicitors for appellant: *Bompas, Bischoff & Co.*
Solicitors for respondent: *Norton, Rose, Norton & Co.*

[PRIVY COUNCIL.]

THE LIQUIDATORS OF THE MARITIME BANK OF CANADA . . . . . } APPELLANTS;

AND

THE RECEIVER-GENERAL OF NEW BRUNSWICK . . . . . } RESPONDENT.

J. C.*
1892
May 11, 12.
July 2.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867—*Relations between Crown and Provinces—Winding-up of Bank—Priority of Provincial Government over other Simple Contract Creditors—Prerogative of the Crown.*

The British North America Act, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sects. 109 and 126 are vested in Her Majesty as sovereign head of each province.

Held, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.

APPEAL from a judgment of the Supreme Court of Canada (Dec. 14, 1889), affirming a judgment of the Supreme Court of New Brunswick (Oct. 19, 1888) upon a special case submitted.

Two questions were raised by the case, the material facts in which are stated in the judgment of their Lordships: first, was the provincial government entitled to payment in full by preference over the noteholders of the bank; second, if not, was the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank.

The first Court answered both questions in favour of the

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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provincial government. The second Court decided the first question by a majority in favour of the appellants, by reason of the provisions of the 79th section of the Bank Act (Revised Statutes of Canada, c. 120). It decided the second question in favour of the respondent, holding in effect that the prerogative rights of the Crown could be invoked and exercised by and on behalf of the provincial government, which was, therefore, entitled to the priority claimed.

The Attorney-General (Sir *R. Webster*), *Stockton*, Q.C. (of the New Brunswick bar), and *R. Brown*, for the appellants:—

The prerogative rights of the Crown cannot be invoked and exercised by the provincial government, as distinguished from the Dominion Government. There is no section in the British North America Act of 1867 which gives this Crown right to the province. Accordingly, if the province possesses that right it must be on the general principle that the Lieutenant-Governor is entitled to exercise the prerogative of the Crown. But the effect of the Act of 1867 is that the Dominion Government represents the four provinces existing at the time of the Union and other provinces which were thereafter to be constituted; and, consequently, the direct connection between the Crown and the provinces has ceased. The Governor-General of Canada is the real representative of the Crown as the Dominion is at present constituted; and the Lieutenant-Governor of each province is not. Certain portions of prerogative are given to the Lieutenant-Governors, and that is inconsistent with their representing the Crown entirely. Otherwise, if the Dominion and the provinces both possess full prerogative rights you might have the Crown as representing the one contending with the Crown as representing the other. The judgment of Gwynne, J., in the Supreme Court was read and the reasoning therein contained adopted, it being suggested that sect. 92 of the Act should have been more emphatically relied on. Reference was also made to *Reg.* v. *Bank of Nova Scotia* (1); *Exchange Bank of Canada* v. *The Queen* (2); *Mercer* v. *Attorney-General of Ontario* (3); *St. Cathe-*

(1) 11 Sup. Ct. Rep. 1.
(2) 11 App. Cas. 157.
(3) 5 Sup. Ct. Rep. 538; S. C. 8 App. Cas. 767.

rine's Milling and Lumber Company v. *The Queen*. (1) If the province as constituted under the Act of 1867 possesses all the rights which existed in the government of the colony before the Act, it is admitted that then it would have the same right of priority as the government had before the Act. But if the scheme of that Act was, as contended by the appellants, to establish a local executive and legislature under a lieutenant-governor who is appointed by the Governor-General, and not by the Queen, with functions different from the old government and legislature, and with powers limited and defined by statute and municipal in their general character, there is no reason why they should possess all the privileges and prerogatives as claimed, to be exercised concurrently, and sometimes it may be in conflict with, the government of the Dominion.

Sir *H. Davey*, Q.C., *Blair*, Q.C. (*Attorney-General for New Brunswick*), and *Ingle Joyce*, for the respondent:—

Sect. 64 of the British North America Act of 1867 enacts that "the constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it existed at the Union until altered under the authority of this Act." Before the Act of 1867 each provincial government exercised the prerogatives of the Crown. They are reserved to them by the Act. Sects. 64 and 65 read together mean that the powers and authorities vested in and exercised by the provincial government at the time of the Union should continue. These powers cannot be cut down except by express enactment, and there is nothing either in the Act of 1867 or in any subsequent Act which abolishes or alters them. According to the true effect of that Act the provincial governments and legislatures are within their respective spheres supreme. They are not made in any way subordinate to the legislature and government of the Dominion. The intention was that the Dominion and the provinces should have co-ordinate authority within their respective spheres, all subject to the control of the Imperial Parliament. Sect. 72 provides that Lieutenant-Governors should appoint their councils in the

(1) 14 App. Cas. 46.

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Queen's name, and fill up vacancies therein in the same way (sect. 75). Further, the provincial legislatures are summoned in the name of the Queen (sect. 82). Reference was also made to sects. 3 and 5 and to 109 and 126 of the Act of 1867; to *Hodge* v. *The Queen* (1); *Powell* v. *Apollo Candle Company* (2); *Théberge* v. *Laudry*. (3)

Stockton, Q.C., replied.

1892. July 2. The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is brought by special leave in a suit which followed upon a case submitted for the opinion of the Supreme Court of the province of New Brunswick, by the appellants, the liquidators of the Maritime Bank of the Dominion of Canada, in the interest of unsecured creditors of the bank, on the one side, and by the Receiver-General of the Province, claiming to represent Her Majesty, on the other. The only facts which it is necessary to refer to are these: that the bank carried on its business in the city of St. John, New Brunswick; and that, at the time when it stopped payment in March, 1887, the provincial government was a simple contract creditor for a sum of $35,000, being public moneys of the province deposited in the name of the Receiver-General. The case, as originally framed, presented two questions for the decision of the Court; but, owing to the condition of the bank's assets, the first of these has ceased to be of practical importance, and it is only necessary to consider the second, which is in these terms: "Is the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank?"

The Supreme Court of New Brunswick unanimously, and, on appeal, the Supreme Court of Canada with a single dissentient voice, have held that the claim of the provincial government is for a Crown debt to which the prerogative attaches, and therefore answered the question in the affirmative.

(1) 9 App. Cas. 117. (2) 10 App. Cas. 282.
(3) 2 App. Cas. 102.

The Supreme Court of Canada had previously ruled, in *Reg.* v. *Bank of Nova Scotia* (1), that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over others creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign, subject to the disposal and appropriation of the legislature of Canada; and the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank of Canada* v. *The Queen* (2), this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion Government upon the ground that, by the law of the province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.

Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal

(1) 11 Sup. Ct. Rep. 1. (2) 11 App. Cas. 157.

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government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge* v. *The Queen* (1), Lord Fitzgerald, delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.

It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It

(1) 9 App. Cas. 117.

possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a province is appointed, not by Her Majesty, but by the Governor-General, who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose Viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by sect. 58, the appointment of a provincial governor is made by the "Governor-General in Council by Instrument under the Great Seal of Canada," or, in other words, by the Executive Government of the Dominion, which is, by sect. 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

The point raised in this appeal, as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign as supreme head of the State, appears to their Lordships to be practically settled by previous decisions of this Board.

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The whole revenues reserved to the provinces for the purposes of provincial government are specified in sects. 109 and 126 of the Act. The first of these clauses deals with "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union," which it declares "shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise." If the Act had operated such a severance between the Crown and the provinces, as the appellants suggest, the declaration that these territorial revenues should "belong" to the provinces would hardly have been consistent with their remaining vested in the Crown. Yet, in *Attorney-General of Ontario* v. *Mercer* (1); *St. Catherine's Milling and Lumber Company* v. *The Queen* (2); and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (3), their Lordships expressly held that all the subjects described in sect. 109, and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each province. Sect. 126, which embraces provincial revenues other than those arising from territorial sources, and includes all duties and revenues raised by the provinces in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the provinces as a right of appropriation to the public service. And, seeing that the successive decisions of this Board, in the case of territorial revenues, are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial.

Being of opinion that the decisions of both Courts below were sound, and agreeing with the reasons assigned by the learned judges, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellants must pay to the respondent his costs of this appeal.

Solicitors for appellants: *Linklater & Co.*

Solicitors for respondent: *Field, Roscoe, & Co.*

(1) 8 App. Cas. 767. (2) 14 App. Cas. 46. (3) 14 App. Cas. 295.

[PRIVY COUNCIL.]

CITY OF WINNIPEG . . . . . APPELLANT;

AND

BARRETT . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

CITY OF WINNIPEG . . . . . APPELLANT;

AND

LOGAN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Law of Canada—Province of Manitoba—Dominion Statute, 33 *Vict. c.* 3—*Manitoba Public Schools Act,* 1890—*Denominational Schools—Powers of Provincial Legislature.*

According to the true construction of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute), having regard to the state of things which existed in Manitoba at the date thereof, the legislature of that province did not exceed its powers in passing the Public Schools Act, 1890.

Sect. 22 of the Act of 1870 authorizes the provincial legislature exclusively to make laws in relation to education so as not to "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice in the province, at the Union":—

Held, that the Act of 1890, which abolished the denominational system of public education established by law since the Union, but which did not compel the attendance of any child at a public school, or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain, and conduct its own schools, did not contravene the above proviso; and that accordingly certain by-laws of a municipal corporation which authorized assessments under the Act were valid.

APPEAL in the first case from a judgment of the Supreme Court (Oct. 28, 1891), reversing one of the Court of Queen's Bench for Manitoba (Feb. 2, 1891); in the second case from a

* *Present*:—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

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judgment of the Court of Queen's Bench (Dec. 19, 1891), which followed that of the Supreme Court.

The province of Manitoba joined the Union in 1870, upon the terms of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute). Sect. 22 is the material section, and is set out in their Lordships' judgment. In 1890 the provincial legislature passed two statutes relating to education—chaps. 37 and 38—the latter of which is intituled "The Public Schools Act, 1890." Its validity was the subject of this appeal.

The facts are stated in the judgment of their Lordships.

In the first case the application was for a summons to shew cause why the by-laws in question, which were passed under the Act for levying a rate for school and municipal purposes in the city of Winnipeg, should not be quashed for illegality on the ground that the amounts levied for Protestant and Roman Catholic schools were therein united, and that one rate was levied upon Protestants and Catholics alike for the whole sum, in a manner which but for the Act of 1890 would have been invalid, according to the Education Acts thereby repealed.

Killam, J., dismissed the summons, holding that the rights and privileges referred to in the Dominion Statute were those of maintaining denominational schools, of having children educated in them, and of having inculcated in them the peculiar doctrine of the respective denominations. He regarded the prejudice effected by the imposition of a tax upon Catholics for schools to which they were conscientiously opposed as something so indirect and remote that it was not within the Act.

The Court of Queen's Bench affirmed this order. Taylor, C.J., and Bain, J., held that "rights and privileges" included moral rights, and that whatever any class of persons was in the habit of doing in reference to denominational schools should continue, and not be prejudicially affected by provincial legislation, but that none of those rights and privileges had been in any way affected by the Act of 1890. Dubree, J., dissented, holding that the right or privilege existing at the Union was the right of each denomination to have its denominational school, with such teaching as it might think fit, and the privilege of not being compelled to contribute to other schools of which members

of such denomination could not in conscience avail themselves; and that the Act of 1891 invaded such privilege, and was consequently ultra vires.

The Supreme Court reversed the order.

Ritchie, C.J., held that as Catholics could not conscientiously continue to avail themselves of the public schools as carried on under the system established by the Public Schools Act, 1890, the effect of that Act was to deprive them of any further beneficial use of the system of voluntary Catholic schools which had been established before the Union, and had thereafter been carried on under the State system introduced in 1871. Patterson, J., pointed out that the words "injuriously affect" in sect. 22, sub-sect. 1, of the Manitoba Constitutional Act, would include any degree of interference with the rights or privileges in question, although falling short of the extinction of such rights or privileges. He held that the impediment cast in the way of obtaining contributions to voluntary Catholic denominational schools by reason of the fact that all Catholics would under the Act be compulsorily assessed to another system of education amounted to an injurious affecting of their rights and privileges within the meaning of the sub-section. Fournier, J., pointed out that the mere right of maintaining voluntary schools if they chose to pay for them, and of causing their children to attend such schools, could not have been the right which it was intended to reserve to Catholics or other classes of persons by the use of the word "practice," since such right was undoubtedly one enjoyed by every person or class of persons by law, and took a similar view to that taken by Patterson, J. Taschereau, J., gave judgment in the same sense, holding that the contention of the appellants gave no effect to the word "practice" inserted in the section.

In the second case a similar application was made by the respondent Logan, and allowed in consequence of the Supreme Court's decision in Barrett's case.

Sir *H. Davey*, Q.C., *McCarthy*, Q.C., and *Campbell* (both of the Canadian bar), for the appellant, contended that the view taken by Killam, J., Taylor, C.J., and Bain, J., was correct. The

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Act of 1890 did not affect any right or privilege with respect to denominational schools which the respondent or any class of persons had by law or practice in the province prior to the Union. It established one system of public schools throughout the province, and abolished all the laws regarding public schools which had theretofore been passed and were then existing. Sects. 21 and 22, sub-sects. 1, 2, and 3, of the Manitoba Act, 1870, were referred to, and the various affidavits which had been made in the case, and it was contended that the Act of 1890 was not ultra vires. It enacted that all public schools in the province are to be free schools (sect. 5); that all religious exercises therein shall be conducted according to the regulation of the advisory board which is provided by sect. 6; but in case the guardian or parent of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then the pupil need not attend. All public schools are non-sectarian, and no religious exercises are allowed, except as provided by the Act, which, moreover, is not compulsory.

With regard to the state of things, "law or practice" in Manitoba prior to the Union, the law then in force was the law of England, as it existed at the date of the Hudson's Bay Company's charter, viz. the 2nd of May, 1670, in so far as applicable. Accordingly, the respondent had not, nor had the Roman Catholics of the province, any right or privilege by law in relation to the Roman Catholic denominational schools. The only right and privilege on this subject which they possessed was, as shewn by the affidavits, the privilege to establish and maintain private schools which were supported by fees paid by the parents or guardians of the children who attended them, supplemented, it may be, by those who belonged to the Roman Catholic Church. The Act of 1890 does not interfere with or prejudicially affect this right; for the respondent and Roman Catholics are still entitled to establish and maintain denominational schools as before the Union. Consequently it has not been shewn that the Act interferes with any rights and privileges which were locally enjoyed within the city.

Reference was made to *Ex parte Renaud* (1); *Fearon* v.

(1) 1 Pugsley N. B. R. 273.

Mitchell (1). In the other appeal, the respondent Logan represented members of the Church of England, whose rights and privileges were similar to those of Barrett and his co-religionists.

Sir *Richard Webster*, A.G., *Blake*, Q.C., and *Ewart*, Q.C. (both of the Canadian bar), and *Gore*, for the respondent Barrett:—

The Act of 1890 prejudicially affects the rights and privileges of Roman Catholics in the province, as they existed by law or practice at the date of the Union, with respect to denominational schools. By its operation they are deprived of the system of Roman Catholic denominational schools as they existed before the Union. The public schools constituted by the Act are, or may be, Protestant denominational schools, and Catholic ratepayers are compelled to contribute thereto. They cannot conscientiously permit their children to attend the schools established by the Act, and, having regard to the compulsory rate levied upon them in support thereof, material impediments are cast in the way both of subscribing and of obtaining subscriptions in support of Catholic denominational schools, and of setting up and maintaining the same. The rights and privileges of Catholics are, accordingly, prejudicially affected. At the date of the Union there was not, and there never had been, any State system of education in Manitoba, nor was there any compulsory rate or State grant for purposes of education. There was, however, an established and recognised system of voluntary denominational education, including Roman Catholic schools supported in part by voluntary contributions from Catholics and contributed by the Roman Church. In a similar way, the Church of England and various Protestant sects supported their own schools. The provincial legislature established by the Dominion Statute of 1870, passed 34 Vict. c. 12, establishing a State system of education in the province. Subsequent Acts were passed, and the whole were codified by 44 Vict. c. 4; and modification was made therein by 45 Vict. cc. 8 and 11; 46 & 47 Vict. c. 46; 47 Vict. cc. 37 and 54; 48 Vict. c. 27; 50 Vict. cc. 18 and 19; 51 Vict. c. 31; 52 Vict. cc. 5 and 21; all which Acts shew that useful education can be provided without disturbing rights and privileges as they

(1) Law Rep. 7 Q. B. 690.

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existed in 1870. Then came the Act complained of. Besides the establishment of public schools, controlled as to religious teaching by an advisory board, sect. 179 abolished pre-existing Catholic school districts, and provided that all the assets of such Catholic schools should belong to, and all the liabilities thereof should be paid by, the public school districts established by the new Act. The right and privilege which had been prejudicially affected was the right to have a religious education conducted under the supervision of their Church, administered in the schools which they were compelled to support; to have the immunity existing in 1870, from being compelled to support schools to which they objected. Their interests were prejudiced in being compelled by the Act to support one set of schools while, as a matter of religion and conscience, they would, at the same time, have to establish another set of schools to which alone they could send their children. The new public schools, controlled ultimately by a majority of ratepayers, would be conducted for the benefit of Protestant and Presbyterian denominations, and Catholics would thereby be prejudiced and injured. It was contended that *Fearon* v. *Mitchell* (1) had no bearing on the case. See *Musgrave* v. *Inclosure Commissioners* (2), and *Barlow* v. *Ross* (3), where the existence of rights and privileges is discussed. In *Ex parte Renaud* (4) the head-note is wrong. It was not decided that no legal privilege existed in that case, but merely that it had not been infringed.

A. J. Ram, for the respondent Logan.

McCarthy, Q.C., replied.

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July 30.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN:—

These two appeals were heard together. In the one case the city of Winnipeg appeals from a judgment of the Supreme Court of Canada reversing a judgment of the Court of Queen's Bench for Manitoba; in the other from a subsequent judgment of

(1) Law Rep. 7 Q. B. 690.
(2) Law Rep. 9 Q. B. 162.
(3) 24 Q. B. D. 381.
(4) 1 Pugsley N. B. R. 273.

the Court of Queen's Bench for Manitoba following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the city of Winnipeg which authorized assessments for school purposes in pursuance of the Public Schools Act, 1890, a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception. The views of the Roman Catholic Church were maintained by Mr. Barrett; the case of the Church of England was put forward by Mr. Logan. Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett; while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone.

The controversy which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the province of Manitoba, and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this Board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the provincial legislature has or has not exceeded its powers in passing the Public Schools Act, 1890.

Manitoba became one of the provinces of the Dominion of Canada under the Manitoba Act, 1870, which was afterwards confirmed by an Imperial Statute known as the British North America Act, 1871. Before the Union it was not an independent province, with a constitution and a legislature of its own. It formed part of the vast territories which belonged to the Hudson's Bay Company, and were administered by their officers or agents.

The Manitoba Act, 1870, declared that the provisions of the British North America Act, 1867, with certain exceptions not material to the present question, should be applicable to the province of Manitoba, as if Manitoba had been one of the provinces originally united by the Act. It established a legislature for Manitoba, consisting of a legislative council and a legislative

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assembly, and proceeded, in sect. 22, to re-enact with some modifications the provisions with regard to education which are to be found in sect. 93 of the British North America Act, 1867. Sect. 22 of the Manitoba Act, so far as it is material, is in the following terms:—

"In and for the province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union."

Then follow two other sub-sections. Sub-sect. 2 gives an "appeal," as it is termed in the Act, to the Governor-General in Council from any act or decision of the legislature of the province, or of any provincial authority, "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Sub-sect. 3 reserves certain limited powers to the Dominion Parliament, in the event of the provincial legislature failing to comply with the requirements of the section, or the decision of the Governor-General in Council.

At the commencement of the argument a doubt was suggested as to the competency of the present appeal, in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sects. 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

Sub-sects. 1, 2, and 3 of sect. 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of sect. 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in sub-sect. 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not perhaps very

easy to define precisely the meaning of such an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the force of law." Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union.

What then was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law or regulation or ordinance with respect to education in force at the time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete.

"There existed," he says, "in the territory now constituting the province of Manitoba a number of effective schools for children.

"These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church and others by various Protestant denominations.

"The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attend the schools, and the rest was paid out of the funds of the Church, contributed by its members.

"During the period referred to, Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools

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of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to, the support of any other schools."

Now, if the state of things which the archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body, which was engaged in a similar work at the time of the Union, would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognised by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics, and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a "natural right" which "does not want any legislation to protect it." Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing "by practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not apparent of them-

selves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.

Manitoba having been constituted a province of the Dominion in 1870, the provincial legislature lost no time in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools, as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into twenty-four electoral divisions, for the purpose of electing members to serve in the legislative assembly. By the Act of 1871 each electoral division was constituted a school district in the first instance. Twelve electoral divisions, "comprising mainly a Protestant population," were to be considered Protestant school districts; twelve, "comprising mainly a Roman Catholic population," were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the school in addition to what was derived from public funds. It is perhaps not out of place to observe that one of the modes prescribed was "assessment on the property of the school district," which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support of a Roman Catholic school. In the event of an assessment, there was no provision for exemption, except in the case of the father or guardian of a school child —a Protestant in a Roman Catholic school district or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section, and contributing to it an amount equal to what he would have paid if he had belonged to that district.

The laws relating to education were modified from time to

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time. But the system of denominational education was maintained in full vigour until 1890. An Act passed in 1881, following an Act of 1875, provided, among other things, that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890, enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school or a Roman Catholic ratepayer for a Protestant school.

In 1890 the policy of the past nineteen years was reversed; the denominational system of public education was entirely swept away. Two Acts in relation to education were passed. The first (53 Vict. c. 37) established a department of education, and a board consisting of seven members, known as the "Advisory Board." Four members of the board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the advisory board was to prescribe the forms of religious exercises to be used in the schools.

The Public Schools Act, 1890 (53 Vict. c. 38), enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. The provisions of the Act with regard to religious exercises are as follows:—

"6. Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place.

"7. Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees it shall be the duty of the teachers to hold such religious exercises.

"8. The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

The Act then provides for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. In cities the municipal council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools; but it is provided that any school not conducted according to all the provisions of the Act, or any Act in force for the time being, or the regulations of the Department of Education, or the advisory board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant. Sect. 141 provides that no teacher shall use or permit to be used as text-books any books except such as are authorized by the advisory board, and that no portion of the legislative grant shall be paid to any school in which unauthorized books are used. Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants.

Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the Union.

Notwithstanding the Public Schools Act, 1890, Roman

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Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case), to send their children to public schools where the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890 are in reality

Protestant schools. The legislature has declared in so many words that "the public schools shall be entirely unsectarian," and that principle is carried out throughout the Act.

With the policy of the Act of 1890 their Lordships are not concerned. But they cannot help observing that, if the views of the respondents were to prevail, it would be extremely difficult for the provincial legislature, which has been entrusted with the exclusive power of making laws relating to education to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the legislature, which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of school-houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.

In the result their Lordships will humbly advise Her Majesty that these appeals ought to be allowed with costs. In the *City of Winnipeg* v. *Barrett* it will be proper to reverse the order of the Supreme Court with costs, and to restore the judgment of the Court of Queen's Bench for Manitoba. In the *City of Winnipeg* v. *Logan* the order will be to reverse the judgment of the Court of Queen's Bench, and to dismiss Mr. Logan's application, and discharge the rule nisi and the rule absolute with costs.

Solicitors for the city of Winnipeg: *Freshfields & Williams.*
Solicitors for Barrett: *Bompas, Bischoff & Co.*
Solicitors for Logan: *Harrison & Powell.*

[PRIVY COUNCIL.]

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PALGRAVE GOLD MINING COMPANY . APPELLANTS;

AND

McMILLAN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Law of Nova Scotia—Revised Statutes of Nova Scotia (5th Series), c. 7, s. 19—Appointment of Arbitrator in default of the Proprietor—Notice not necessary.

Where the warden of the municipality had under Revised Statutes of Nova Scotia (5th Series), c. 7, s. 19, appointed an arbitrator on behalf of the respondent to estimate damages to be paid to him by the appellants under the statute, and it appeared that the respondent had received and neglected a notice under sect. 18 to appoint:—

Held, that such appointment was not a judicial act, and that a fresh notice to the respondent in relation thereto was not a condition precedent to its validity.

Where an award gave to a landowner a fixed sum as estimated damages for all works or occupation necessary to or required by the mining lessee, *held*, that having regard to the subject-matter and scope of the Act, such award was not bad for uncertainty.

APPEAL from a judgment of the Supreme Court (Crown Side), dated July 10, 1891, which ordered that the award and all proceedings in the arbitration should be set aside with costs.

The question at issue was as to the validity of an award under sect. 20 of the Mines and Minerals Consolidation Act, c. 7 of the Revised Statutes of Nova Scotia (5th Series).

The facts are stated in the judgment of their Lordships.

Jelf, Q.C., and *Tyrell Paine*, for the appellants, contended that the judgment should be reversed and the award established. The award could not be void for uncertainty, for it followed the precise words of sect. 20 in defining the subjects for which the damages were assessed. Those damages must be taken to be in respect of the exercise of all the statutory rights given to the

* *Present:*—LORD HOBHOUSE, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

mining lessee over the whole of the area mentioned in the award; and there was no necessity to define them more minutely, and so incur the risk of further disputes. There was no dispute between the parties as to the amount of land to be occupied by the mining lessee for the purpose of exercising mining rights; and consequently no necessity for the award specifying the particular lands to which it applied. The award is as certain as the circumstances will permit: see *Philips* v. *Knightley* (1); *Cargey* v. *Aitcheson* (2).

With regard to the invalidity of the appointment of the arbitrator, the warden of the municipality was empowered by statute to appoint him upon default in that respect by the respondent who was entitled to appoint in the first instance. Notice had been given to him by the warden to make his appointment, and he made default. Thereupon the title of the warden to appoint was complete, and the respondent was not entitled to notice of the appellants' application to him to exercise that right.

Channell, Q.C., and *Gore*, for the respondent, contended that the award was bad for uncertainty. It ought to have specified the lands required by the lessee; and also all the matters in respect of which damages were assessed. Until the lands have been duly specified and found to be required for the purposes mentioned in sect. 20, the jurisdiction of the arbitrator to assess damages does not arise. No reference in fact was held upon the award; or if any, it was not held at the place and time notified and was not attended by the respondent, who had no sufficient notice and no sufficient opportunity of attending it. The arbitrators moreover assessed damages without evidence and without inspecting the property. Further, there was no valid appointment of an arbitrator by the warden. He purported to appoint without notice to the respondent and other surface owners. The appointment of an arbitrator by the warden was a judicial act: *Lord* v. *Lord* (3); *In re Hopper* (4). When a judicial Act is done affecting the rights of parties, they are

(1) 2 Str. 903.
(2) 2 B. & C. 170.
(3) 26 L. J. (Q.B.) 34.
(4) Law Rep. 2 Q. B. 367.

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entitled to be heard: *Cooper* v. *The Wandsworth Board of Works* (1).

Jelf, Q.C., replied.

1892. July 23. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The appellants hold a lease from the Crown of certain gold mines, which extend over the whole of a small island situate in Isaac's Harbour, and called Hurricane Point. The respondent is the owner of a plot of land in the island. The question is as to the validity of an award made for the purpose of estimating the damages to be paid to the owners by the lessees under the provisions of the statute, chap. 7, of the Revised Statutes of Nova Scotia (5th Series).

The award embraced damages to be paid to other landowners besides the respondent, but its validity has been challenged by the respondent alone. For that purpose he applied in the Supreme Court for a writ of certiorari, and he also moved the Court to quash the award. The appellants' counsel have urged objections to the propriety of that procedure. But it is clear that an invalid award may be set aside in some way or other by the Supreme Court; and it is not suggested but that the merits of this case were fully brought before the Court. Therefore, even if the appellants could shew that the proceedings were informally started, their Lordships would not on that ground be willing to reverse the judgment; and so they declined to hear the point argued.

It will be convenient to state the material provisions of the statute which governs the case.

Sect. 18 is as follows: "When the holder of a lease of areas on private lands cannot make an agreement with the owner thereof for leave to enter and for easements, and for damage to such lands, and for the other purposes mentioned in sect. 20 of this chapter, it shall be lawful for such holder to give notice

(1) 14 C. B. (N.S.) 180.

to the owner or tenant to appoint an arbitrator to act with another arbitrator named by the lessee of the areas, in order to award the amount of damages to which the owner or tenant shall be entitled, by reason of the opening and working of a mine in such lands, and the doing the acts or things contemplated by this section and the said sect. 20: and if any lessee shall enter and work upon the land leased before he shall have agreed with the owner of the land, or have proceeded to have his damages appraised in accordance with this section, the owner may complain to the Supreme Court, who shall investigate the complaint, and if the same is substantiated shall declare the lease to be forfeited."

By sect. 19 it is enacted that—"If the proprietor refuses or declines to appoint an arbitrator, or when for any other reason no arbitrator is appointed by the proprietor in the time limited therefor in the notice provided for by the next preceding section, the warden of the municipality wherein the lands lie shall, on being satisfied by affidavit that such notice has come to the knowledge of such owner, agent, or tenant, or that such owner, agent, or tenant wilfully evades the service of such notice, or cannot be found, and that reasonable efforts have been made to effect such service, and that the notice was left at the last place of abode of such owner, agent, or tenant, appoint an arbitrator on his behalf."

By sect. 20 it is enacted that—"All arbitrators appointed under the authority of this chapter shall be sworn before a justice of the peace to the impartial discharge of the duties assigned to them; and they shall forthwith proceed to estimate the reasonable damages which the owners and tenants of such lands according to their several interests therein shall sustain by reason of the opening of necessary shafts and other excavations, the construction of roads and drains, the erection of necessary works and buildings thereon, and of the occcupation of so much thereof (to be determined by the Inspector of Mines in the event of any dispute arising in respect thereof) as the lessee may require for all purposes connected with the opening and working of a mine to the most advantage thereon, including therein all such spaces as may be necessary from time to time for a dumping

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ground or grounds for depositing the mineral mined, as well as slate, stone, shale, screenings, waste coal, refuse, rubbish, and all other material mined or excavated by such lessee and those claiming under him."

Sect. 26 provides for damages ensuing subsequent to the agreement or award, and sect. 44 gives protection to buildings and enclosures.

On the 23rd of April, 1890, the appellants served a written notice on the respondent and twelve other persons, being all the landowners of Hurricane Point. After describing the ambit of the island, and referring to the Crown lease and to the statute, the notice proceeded as follows :—

"Pursuant to the provisions of said chap. 7 of the Revised Statutes of Nova Scotia (5th Series), the said Palgrave Gold Mining Company, lessee as aforesaid of the areas and the mining rights in said areas covered by the lands above referred to, hereby notify you and each and every of you, and all persons having or claiming any right to damages for entry upon the said lands by reason of the opening of necessary shafts, and other excavations, the construction of roads and drains, the execution of necessary works and buildings thereon, and of the occupation of so much thereof as the lessees may require for all purposes connected with the opening of a mine to the most advantage thereon, including therein all such space as may be necessary from time to time as a dumping ground or grounds for depositing the mineral mined, as well as slate, stone, shale, screenings, waste coal, refuse, rubbish, and all other material mined or excavated by said lessee or those claiming under said lessee, to appoint on or before the 5th day of May, 1890, an arbitrator to act with Hercules Hewitt, the arbitrator named by or on behalf of the said lessee, in order to award the amount of said damages to which you are or shall be entitled by reason of the opening and working of a mine in said lands, and the doing the acts and things contemplated by the said sects. 18 and 20 of said chap. 7 of the Revised Statutes of Nova Scotia (5th Series)."

It will be observed that the notice follows the terms of sect. 20 of the statute, except that there is no mention of the Inspector of Mines.

The respondent replied by a counter-notice, stating that he "hereby objects to the said notice, to the arbitrator Hercules Hewitt therein named as arbitrator on behalf of the said company, and to all or any proceedings which have been or may be instituted or carried on under the said Act in pursuance of the notice, on the following among other grounds." He then sets forth fourteen grounds of objection, contending that Hewitt was an improper person for arbitrator, and that the company were not in a position to take the steps they were taking.

Upon that the appellants made application to the warden of the municipality, who, after receiving the necessary affidavit, of his own authority appointed Hugh Hughes to be arbitrator on behalf of the landowners.

On the 17th of May the arbitrators caused a written notice to be served on the respondent and the twelve other landowners in the following terms:—

"Take notice that, in consequence of your not having appointed an arbitrator in compliance with the notice served upon you on the 23rd day of April last, and the warden of the municipality wherein the lands referred to in said notice lie being satisfied by affidavit of the due service of such notice on all the parties therein named for the period of ten days and upwards, said parties being residents in the county wherein the lands lie, has appointed Hugh Hughes as the arbitrator on your behalf, and the arbitrator so appointed and the arbitrator appointed by the Palgrave Gold Mining Company, both of whom have been duly sworn to the impartial discharge of the duties assigned them, will meet at nine o'clock in the forenoon, on the 19th day of May instant, at Hurricane Island or Hurricane Point, at Isaac's Harbour, in the county of Guysborough, to estimate and award the reasonable damages which you shall sustain according to your several interests from the mining and other things to be done, and buildings and works to be erected, more particularly mentioned in said notice served upon you; and you are hereby notified to attend said assessment of damages, and, in default of your so attending, the arbitrators will proceed ex parte to assess and award such damages."

On the same day, after service of the notice on the respondent,

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Hughes exhibited to him his authority to act as arbitrator, whereupon the respondent forbad him to enter the island, and said that he would not get there, and if he had attempted to do so he would have been prevented.

Nevertheless, on the 19th the two arbitrators, accompanied by Mr. Fisher on behalf of the company, took a boat and rowed over to the island. When they neared the land they were met by the respondent and twelve other men, some of whom were armed with guns and pistols, and who threatened the party with death if they attempted to land. The arbitrators rowed twice round the island, seeking a spot to put in at, but the respondent and his men met them everywhere with the same threats. Even when they tried to land upon a wharf below high-water mark belonging to the company, the thirteen men came to the front of the wharf and threatened to shoot if the boat came closer.

Thus prevented from conducting the arbitration on the land which was the subject of it, the arbitrators proceeded as best they could. One of them is thoroughly acquainted with the island. The other says that he was able by rowing round the island to get a fair view of it, and to judge of its value, and to estimate the damages. The whole island is only 4½ acres in extent. Mr. Fisher describes it as follows:—

"The land is of a flat surface and very narrow, in places not over sixty feet, and can be seen nearly as well from the water as when on its surface, and its value judged of also. It is a piece of land very rocky and barren, and, with the exception of two or three small spots, is unfit for cultivation, and is of very little value except in connection with the gold mining areas owned by the said company."

The arbitrators substantially agree in that description, nor is there any contradiction of it.

The award is dated the 19th of May, and is as follows:—

"Award.

"To all to whom these presents shall come, greeting:—

"Whereas, the Palgrave Gold Mining Company are the lessees of certain mining leases issued by the Provincial Government of Nova Scotia, and still in force, authorizing said company to

mine, after the assessment of damages for surface rights on lands at Isaac's Harbour, in the county of Guysborough, known as Hurricane Point or Hurricane Island, owned or claimed to be owned by Allan McMillan, Stephen McMillan, Elizabeth Giffin, John McMillan, Robert C. McMillan, Reuben McMillan, Lorinda Cox, Mary Jane Sweet, Hugh McMillan, Effie McMillan, Stephen Sweet, A. B. Cox, and Whitman Giffin.

"And whereas, the said company having been unable to make an arrangement with such owners as to the amount to be paid them for such damages, caused a notice to be served on said parties, and each and every of them agreeably to the statute in each case made and provided to appoint an arbitrator on a day therein named, and the said owners having failed to comply or make such appointment, and the warden of the municipality wherein the lands lie, having been satisfied by affidavit of the due service of said notice and of the other facts above stated, appointed the undersigned Hugh Hughes, an arbitrator, on behalf of said owners, to act with Hercules Hewitt, the other undersigned arbitrator appointed by said company; all of which facts above stated have been duly proved before us by sworn testimony.

"Now know ye, that we, the said arbitrators so appointed, having been duly sworn to the impartial discharge of the duties assigned to us in this behalf, and having caused notice to be served on all the parties to attend this day for the purpose of having such assessment of damages awarded, John McMillan, Stephen McMillan, Robert C. McMillan, Hugh McMillan, Whitman Giffin attended, and the president of the said company having attended on behalf of the said company, and the above and other facts having been established by proof to our satisfaction, do award and adjudge as follows—namely, that the damages to be sustained and suffered by the owners, by reason of the opening of necessary shafts and other excavations, the construction of roads and drains, the erection of necessary works and buildings thereon, and of the occupation of so much thereof as the lessees may require for purposes connected with the opening and working of a mine to the most advantage thereon, including therein all such spaces as may be necessary from time

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to time for a dumping ground for depositing the minerals mined, as well as slate, stone, shale, screenings, waste, coal, refuse, rubbish, and all other materials mined and excavated by the said company, and those claiming under them, is fifty dollars, to be divided into ten equal parts, one part or five dollars to be paid to each of the following parties, namely, to the said Allan McMillan, Stephen McMillan, John McMillan, Robert C. McMillan, Reuben McMillan, Hugh McMillan, and Effie McMillan, and one share of five dollars to Whitman Giffin and Elizabeth Giffin, in right of said Elizabeth Giffin, wife of said Whitman Giffin, and one share or five dollars to Stephen Sweet and Mary Jane Sweet, in right of the said Mary Jane Sweet, wife of the said Stephen Sweet, and one share or five dollars to A. B. Cox and Lorinda Cox, in right of said Lorinda Cox, wife of said A. B. Cox, all of which sums shall be paid to the said parties respectively by the said Palgrave Gold Mining Company, as directed by chapter 7 of the Revised Statutes of Nova Scotia (5th Series).

"And we further award, decree, and adjudge that after such payments shall be made, or the depositing thereof, as directed by said chapter or statute in case of the same being refused, that the said the Palgrave Gold Mining Company shall be entitled to enter upon the land herein mentioned, for all or any of the purposes referred to in this award, and mine and do all other things mentioned in this award, for which such damages have been assessed and allowed.

"Dated this 19th day of May, A.D. 1890.

"Hugh Hughes,
"Hercules Hewitt,
"Arbitrators."

The grounds submitted to the Supreme Court for invalidating the award are stated by Weatherbe, J., as follows:—

"1. The award was bad for uncertainty. The award does not shew for what part of the lands the arbitrators have given damages. That the award should define the number and position of shafts, buildings, and everything else, including damages likely to occur to streams of water, &c.

"2. The award is bad for awarding damages in a round sum.

"3. The arbitrator was an employé of the company.

"4. There was no notice of the application to the warden to appoint an arbitrator.

"5. There was no notice of the appointment of arbitrator.

"After hearing Mr. Ross we considered it unnecessary to call on Mr. Wallace for the company on the several grounds referred to, except as (1.) to the uncertainty of the award; (2.) want of notice of application to the warden."

Their Lordships state this matter in detail, because an additional ground is now taken, and has been earnestly urged at the bar. The respondent says that the appeal should be dismissed, because the award is invalid for three reasons, stated in his notice of motion, though not urged before the Court. They are as follows:—

"18. Because the said arbitrators did not enter upon the lands or view the same before making the said award.

"19. Because there was no evidence before the arbitrators upon which any award could be made."

"21. Because the said John McMillan received no sufficient notice of any meeting of the said arbitrators, and had no opportunity to call and examine witnesses, or give evidence before the arbitrators."

Those grounds were abandoned in Court, and it is very easy to understand why. It is a very bold thing for one whose lawless violence has been the sole cause of preventing the ordinary and regular course of proceedings to come forward and complain of injury because the proceedings have not been ordinary and regular. Courts of justice are not in the habit of listening to such complaints. In fact, their Lordships, on the materials before them, are of opinion that the arbitrators were quite justified in the course they took. They were forcibly prevented from entering on the lands; they were entitled to act on their knowledge and observation of the ground; the respondent, and indeed all the other owners, had received sufficient notice of their intended meeting; and it is trifling with the case to suggest that any further notice would have been of any avail to people who had met the two former notices with defiance and menace. But even if the respondent's case could be made to wear a more

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favourable aspect, their Lordships would not think it right to entertain objections to the award which must have been deliberately abandoned in the Court below, and which if urged then, and if thought of importance, might have been the object of further inquiry and explanation.

As for the two objections which were urged and were not at once overruled, Weatherbe, J., thought them insufficient; but the rest of the Court, Townsend, and Meagher, JJ., were of a different opinion. They considered that the warden's appointment of an arbitrator was invalid for want of notice to the parties, and also that the award is void for uncertainty. An order thereupon was made on the 10th of July, 1891, having the effect of quashing the award, of dismissing a motion and appeal brought by the appellants to quash the certiorari and of throwing upon them the whole costs of the proceedings. That is the order now appealed from.

As regards the warden's appointment of Mr. Hughes, the Court say that it is a judicial act, which in their judgment cannot be properly performed without notice to the parties. Whether there is any sense in which such an act can be called judicial need not be discussed. It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointments should be made with integrity and impartiality; but it is new to their Lordships to hear them called judicial acts, and it is certainly not the practice to give notice or to invite discussion in any way before making such an appointment, though the appointor might in some cases think fit to do so. If it were held that notice was a condition precedent to their validity, many appointments, and consequently many awards, would be invalid in England. In the statute now under discussion, careful provisions are made for notice to an owner at the commencement of proceedings; but when he has once failed to appoint his arbitrator, power is given to the warden to appoint, and nothing is said about notice. For these reasons their Lordships hold that the objection to Mr. Hughes' appointment has no substance in it.

On the point of uncertainty, the Court below think, as Townsend, J., puts it, that the intention of the statute is to fix

definitely just how much of the owner's land should be taken from him; and this, in the judgment of Meagher, J., is to be determined by the Inspector of Mines prior to the making of the award. Otherwise, they say, the lessee's right extends to the whole property described in the notice; and that is too general and indefinite a right to be upheld. It seems however to their Lordships that this general and indefinite right is the very thing which the statute contemplates as existing, and for the exercise of which it provides compensation to the landowner so far as the injury to him can be estimated.

Their Lordships have not the means in this case of learning the exact nature of the rights which the Crown in Nova Scotia possessed prior to the statute in question for the purpose of getting precious metals. But they observe that the statute does not confer any such rights. In the case of prospecting licenses, it is assumed that the licensees can make the requisite experiments. In the case of leases, it is assumed that the lessees can enter and work. In both cases provisions for compensation to landowners are introduced by way of restrictions and conditions imposed on the rights conferred by the Crown. It was doubtless the intention of the legislature to lay down a fairly workable system for the exercise of concurrent rights, very apt to come into conflict, and not at all easy to adjust with nicety. Probably their attempt has removed many occasions of uncertainty and quarrel; and if it has left some, that is not surprising, considering the intractability of the subject-matter.

The first restriction imposed on a lessee is that of sect. 18, viz. an absolute prohibition against entering and working under peril of forfeiting the lease, if the lessee does not previously agree with the landowner or proceed to have his damages appraised. The damages are to include all the acts and things contemplated by sect. 20. In the absence of agreement therefore, it is necessary, before the lessee can break up a yard of ground, to estimate the damage to be done by necessary shafts and excavations, by the construction of roads and drains, by the erection of necessary works and buildings, and by the occupation of so much ground as may be required for opening and working the mine, including such spaces as may be necessary from time

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to time for dumping grounds. But it is impossible to specify beforehand whither the proper working of a mine may lead, or what works may become necessary; and in the case of dumping grounds, it is expressly anticipated that the necessity may arise from time to time. As the damages are to be paid beforehand, all that can be done is to make the best estimate of them that can be made. To a certain extent, disputes are provided for by introducing the Inspector of Mines. Whether he is to be called in once for all before the award, and forecast definitely what land is to be occupied, as one of the learned judges below thinks, or whether he is to be called in from time to time whenever the lessee alleges necessity for occupying land, and the owner denies it, is a question to be decided when it arises. It does not arise here, because there has been no dispute as to the areas proper for occupation. It is only important as shewing how clearly the framers of the statute saw the uncertainty of the subject they were dealing with.

The statute does not in terms make it competent, but probably it is competent, to the lessee to give such a notice as would exclude portions of the demised area from the award of damages, and from his right to use or occupy, leaving subsequent requirements to be dealt with either under sect. 26 or by fresh notice under sect. 18. In such case, he might have less damage to pay in the first instance. If he asks that the full rights which the statute contemplates shall be paid for, he would have to pay damage on the basis that, subject to the control of the inspector, there is no part of the land which may not be used by him. His discretion will be guided by the nature of the area demised. And in such a case as this, where the area is mostly barren rock, only $4\frac{1}{2}$ acres in extent, and where a nominal sum, or a mere trifle, may well be supposed to cover all damage which can reasonably be contemplated as likely to occur, the most obvious course would be to give notice in the terms of the statute.

Here the notice is in the terms of the statute, and the material part of the award is in the same terms. Weatherbe, J., states it to be the common practice, nor is there any contradiction of that statement. Where the uncertainty comes in, except so far as it

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is inherent in the subject-matter, their Lordships cannot see. Lessees, landowners, and inspector, all put together, cannot tell what works or occupations will be necessary or required; but the award is to the effect that, whatever are found to be so, the damage done by them is estimated beforehand at fifty dollars (five for each share).

Their Lordships are of opinion that the judgment of the Supreme Court should be discharged, and the motion to quash the award dismissed with costs, and that the respondent should pay the costs of this appeal. They will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellants: *Paine, Son, & Pollock.*
Solicitor for respondent: *Dompas, Bischoff & Co.*

[PRIVY COUNCIL.]

CONNECTICUT FIRE INSURANCE COMPANY . . . . . } PLAINTIFFS;

AND

KAVANAGH . . . . . DEFENDANT.

J. C.*
1892
July 6, 8, 30.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC, APPEAL SIDE.

Fraud—Failure of Proof—New Issue as to Negligence cannot be raised in Appeal.

Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a company of which he was agent, to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed:—

Held, that the appellants could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration, and the evidence of the respondent directed to that issue cannot be accepted as representing

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all that he would have brought forward to rebut a charge of negligence; nor had the points connected with that issue been submitted to the Courts below.

APPEAL from a decree of the Court of Queen's Bench, dated Sept. 26, 1891, affirming a decree of the Superior Court (Nov. 14, 1889).

The action was to recover $2872 32c., which the appellants alleged they had been induced to pay in their own wrong to one Warden King, by the fraud of the respondent, such alleged fraud consisting partly of false and fraudulent misrepresentations, and partly of wilful and fraudulent concealments made with a view to deceive the appellants into making the said payments.

The facts are stated in the judgment of their Lordships.

Bompas, Q.C., and *Gore*, for the appellants, first contended that the evidence shewed that at the date of the fire Warden King was in truth insured with the Scottish Company, and not with the appellants. They submitted that King had himself no contract with the appellants, nor was there one subsisting between them and the respondent on his behalf which King could and did ratify. Even if there had been, the respondent was bound to put an end to it, and not to allow King to ratify it. It was his duty as their agent so to do. There was neither contract nor ratification, but the respondent falsely represented to the appellants that King was, at the date of the fire, insured in their company and had a valid claim against them, and that such insurance was effected on the 14th of July, 1888, and that King was not insured in any other company. He fraudulently concealed from the appellants facts within his knowledge as their agent, and material for them to know in reference to King's claim. Even if the case of fraud failed, the respondent was guilty of negligence and breach of duty as the appellants' agent in not informing the appellants of facts within his knowledge as their agent, material for them to know in judging of their liability and of the validity of his claim. Such negligence under the circumstances was of itself sufficient to support the action and entitle the appellants to the decree claimed. Reference was made to *Lancashire Insurance Company*

v. *Nill* (1), a case decided by the Supreme Court of Pennsylvania in which the facts were exactly similar; *Gifford* v. *Queen's Insurance Company* (2); *Williams* v. *North China Insurance Company* (3); Arnold on Marine Insurance (last ed.) p. 167; *Hagedorn* v. *Oliverson* (4); *Routh* v. *Thompson* (5); *Ogden* v. *Montreal Insurance Company* (6); see also *Swinfen* v. *Lord Chelmsford* (7); and *Thom* v. *Bigland* (8).

Fullarton, Q.C., and *Kavanagh* (of the Canadian bar), for the respondent, contended that upon the evidence the allegations of fraud entirely failed; and that it was not open to them to claim judgment on any other ground. The ordinary rule that fraud must be proved as alleged applies especially in a case where no other ground of claim had been tried and investigated in the Court below. No issue was raised as to negligence in the Court below and evidence directed to an issue as to fraud cannot be accepted, particularly in appeal, as complete or conclusive in reference to another issue so distinct in its character as that on which the appellants now claim a decision in their favour. Moreover, a cause of action founded upon negligence is not within the declaration, and the appellants cannot be allowed to change the whole character of their claim. Upon the merits of the new claim it was contended that the respondent had proved that he was authorized by King to transfer his insurance to the appellants, that he did so by substituted entries in his books in the usual way. He believed that the transference had been effected and so represented to the appellants, and all the circumstances bearing on the appellants' liability were disclosed at the time that the amount payable thereunder was adjusted. See *Routh* v. *Thompson* (5), cited on the other side. The judges below had not been asked to weigh the evidence as to the authority to transfer, or as to the respondent's belief in the validity of the transfer, nor had they discussed those points

(1) Pennsylvania Rep. vol. 114, p. 248.
(2) 1 Hannay, New Brunswick Reports, p. 432.
(3) 1 C. P. D. 757.
(4) 2 M. & S. 485.
(5) 13 East, 274.
(6) 3 Upper Canada C. P. Reports, 497.
(7) 5 H. & N. 890.
(8) 8 Ex. 725.

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in reference to the usual practice of business so as to throw any light on the imputation of negligence. Reference was made to Code of Civil Procedure, s. 320; Porter's Laws of Insurance, p. 425; *Overend & Gurney* v. *Gibb* (1).

Bompas, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON :—

In this case the argument addressed to their Lordships was not confined to the points which were submitted for the decision of the Courts below. Before dealing with these controverted questions, whether old or new, it will be convenient to notice the facts which are not now in dispute.

The respondent, Walter Kavanagh, in the year 1888, acted as agent in Montreal for three different companies carrying on the business of fire insurance. A gentleman, named Warden King, had insured with him certain premises in Montreal, occupied as a paper-box factory, under a policy from one of these concerns, the British America Assurance Company, which expired on the 8th of July, 1888. Before that date the company intimated to the respondent that they declined to renew the policy on any terms; whereupon he, being desirous to keep the insurance in his office, communicated with the son of the assured, who acted for his father in these matters, and, with his assent, opened an insurance with the Scottish Union and National Insurance Company. On behalf of that company he issued to Mr. King a document termed an interim receipt, and received in exchange for it a year's premium of $68 75c. The receipt, which the respondent had admittedly power to issue, constituted an insurance for thirty days from the 8th of July, subject to cancelment at any time within that period upon written notice to the assured. On the 12th of July he received a letter from the manager of the Scottish Company, instructing him to cancel, in reply to which he wrote a letter of remonstrance, urging that the risk was one which the company ought to have no hesitation in accepting. On the 13th of July an answer from the manager, confirming previous instruc-

(1) Law Rep. 5 H. L. 480, 494.

tions, reached his office, was there opened by Mr. Stanger, his chief clerk, and was then forwarded to and received by the respondent on the evening of the same day.

The respondent went to his office early on the morning of Saturday, the 14th of July, when he directed Mr. Stanger to transfer the insurance from the Scottish to the appellant company, and was informed that, in accordance with usual practice, the transfer had already been made in his books. The respondent left early in the forenoon; and, after his departure, Mr. Stanger posted, about 2 P.M., a report to the appellants, informing them, inter alia, that an insurance of Mr. King's premises had been effected on their behalf. The office was then closed for the day, and immediately afterwards Mr. Stanger learned that there was a fire on the premises, but could not ascertain the amount of damage which had been done.

The respondent heard of the fire for the first time on the Sunday forenoon, from Mr. King, junior, whom he then informed that the insurance had been transferred from the Scottish to the appellant company. Mr. King, whose father still held the interim receipt of the Scottish Company, without notice of cancellation, states that he said in reply, "Well, I will expect you to see me out of the matter." According to the respondent's account, the answer he received was, "All right; do whatever you like with it." On the Monday, a written claim for the amount of his loss was preferred by Mr. King against the appellants, and the claim and an estimate of the loss was, on that day, sent to them by the respondent. On the same day the premium which had been received by the respondent was transferred, in his cash book, from the credit of the Scottish Company to that of the appellants. Charles D. Hanson, an insurance adjuster, was, with their assent, appointed to act on behalf of the appellants; and, after receiving his report, they, on the 1st of August, 1888, paid the sum of $2872 32c. to Mr. King.

The appellants filed a writ and declaration against the respondent in January, 1889, in which they alleged that he had been guilty of wilful deceit, and had fraudulently effected, or purported to effect, a transference of the insurance in his books after the fire had occurred, in the knowledge that the Scottish office,

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and not the appellants, were the only insurers at the time, with the fraudulent purpose of relieving himself of a possible claim at the instance of the Scottish Company in consequence of his neglect to give a written notice of cancellation, pursuant to their instructions. Upon that issue, the case went to trial before Wurtele, J., who acquitted the respondent of all imputations of fraud, and dismissed the action with costs. The appellants then carried the case to the appeal side of the Court of Queen's Bench, where, admitting that the transfer had been made in the respondent's books before the fire occurred, they nevertheless insisted that the charge of fraud had been proved. The Court of Queen's Bench, consisting of five judges, unanimously affirmed the decision of Wurtele, J., and dismissed the appeal with costs.

Upon the argument of this appeal, the appellants maintained that the charges of fraud which they prefer are borne out by the evidence. It certainly appears to their Lordships that the conduct of the respondent, when subsequently called upon to explain the particulars of the transaction, was neither candid nor creditable, and was well calculated to excite suspicion; but, upon the facts proved, their Lordships are unable to differ from the conclusion at which all the learned judges below have arrived.

The appellants did not confine their argument to the issue which alone was raised before Wurtele, J., and the Court of Appeal. They argued at great length that their pleadings, taken in connection with the evidence adduced at the trial, disclose such negligence, or breach of duty, committed by the respondent, acting in the capacity of their agent, as is in law sufficient to infer his liability to them for the sum claimed in this action. On the other hand, the respondent maintained that the new cause of action, brought forward here for the first time, was not within the appellants' declaration, that the evidence led at the trial was not directed to it, and that it ought not to be entertained by this Board.

Upon the merits of the new question, the argument of the respondent, shortly stated, was this: That he had authority from Mr. King, junior, to transfer the risk from the Scottish Company to the appellants, and that notice to cancel the receipt of the Scottish Company was therefore unnecessary; that, according to

the practice of insurance agents, a valid substitution was made by the entries of Saturday, 14th of July, of the appellants for the Scottish Company as insurers of the premises; and that the practice was in conformity with the principles recognized in *Routh* v. *Thompson* (1) and similar decisions. In any view, he maintained that his representations to the appellants, to the effect that they were the insurers at the time of the fire, were made by him in good faith, and in the reasonable belief that such was the fact, derived from the general understanding and course of dealing in that part of the world. He also maintained that Mr. Hanson, according to the custom of insurance offices there, was charged with the duty of inquiring into the legal liability of the appellants; and that the whole circumstances bearing upon that liability, as they appeared in the respondent's books, were fully disclosed to him.

Their Lordships are of opinion that, in the circumstances of this appeal, the appellants are not entitled to raise any issue except that of fraud. They do not question the accuracy of the general rule laid down by the Court of Exchequer in *Swinfen* v. *Lord Chelmsford* (2), to the effect that, when a declaration discloses a certain state of facts, the plaintiff may recover upon the liability which the facts disclose. One material difference between that case and the present consists in the fact that the point there raised had been put forward at the trial, so that the defendant had notice of it. *Thom* v. *Bigland* (3), the other authority upon which the appellants relied, in which the plaintiff was held to be precluded from raising any other issue than fraud in the Appeal Court, comes much nearer to the present case. Baron Parke observed (4), "If the words 'falsely and fraudulently' can be struck out of a declaration so as to leave a good cause of action, that may be done." In this case it is of the essence of the appellants' declaration that the respondent was guilty of fraud, and that is not proved. If the allegations of fraud and wilful misrepresentation were expunged, it is exceedingly doubtful whether there would remain an intelligible charge of negligence.

(1) 13 East, 274.
(2) 5 H. & N. 890.
(3) 8 Ex. 725.
(4) 8 Ex. 730.

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Their Lordships do not find it necessary to rest their decision upon that ground. When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice.

In this case there are various points upon which the evidence does not appear to their Lordships to be so full and satisfactory as it might and probably would have been, had the question of negligence been raised at the trial. The points touching the authority of the respondent to make a transfer of the risk on behalf of the assured, and the honesty of his belief in the validity of the transaction of which the appellants complain, depend, as was shown by their argument, upon the degree of credibility to be attached to different witnesses, a matter which ought to have been submitted to the judge before whom they were examined. There are two other points upon which light might have been thrown, had the plea of negligence been taken before him, these being (1.) the ordinary course of insurance business, and (2.) the position and duties of an insurance adjuster. Were their Lordships to decide upon the evidence as it stands, and the arguments addressed to them, they could only be guided by their own knowledge of the course of insurance business in this country, which the evidence shews to be so far different from that followed in the city of Montreal as to make it unsafe to assume that con-

duct which might tend to show negligence in the one case would do so in the other.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal, the costs of which must be borne by the appellants.

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Solicitors for appellant: *Bompas, Bischoff & Co.*
Solicitors for respondent: *Simpson, Rawson & Co.*

[PRIVY COUNCIL.]

ROBINSON . . . . . PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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June 28; *July* 23.

Law of Canada—Interpretation of Code—Civil Code, ss. 1056, 2262 (2)—*Prescription—Widow's Right of Action distinct from that of Deceased.*

An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory Code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein.

Held, that the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by sect. 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under sect. 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased.

APPEAL by special leave from a decree of the Supreme Court (June 22, 1891), reversing by a majority (Fournier, J., dissenting) a decree from the Court of Queen's Bench for Lower Canada, Appeal Side, District of Montreal (June 19, 1890), which had affirmed a decree of the Superior Court in review (Jan. 31, 1889).

The proceedings in the action are stated in the judgment of

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their Lordships. The case in the Supreme Court is reported in 14 Sup. Ct. Rep. p. 105.

Bompas, Q.C., and *Chester Jones*, for the appellant, contended, first, that as the deceased, Patrick Flynn, died within two years of the accident which occasioned his death, his right of action was not barred by the Code. Art. 2262 (2) did not apply; art. 2261 (2), which did apply, enacted that such action should be prescribed in two years. The grounds on which that contention was based were that the actions for bodily injuries mentioned in art. 2262 (2) are not actions for injuries such as Flynn suffered through the respondents' negligence, but are for injuries such as result from an assault or other overt act: see the French version of the article in which "injures corporelles," are the words used and not "dommages corporelles," the former expression implying malice. Moreover, by the terms of art. 2262 (2), actions brought under art. 1056 are excepted from its operation. They contended, secondly—and this was the main contention—that even if Patrick Flynn's action was prescribed during his lifetime and at his death, it was a totally distinct action from that of his widow, which latter was prescribed by the article which gave it, viz., 1056, and the prescription was at the expiration of a year from the death. One reason assigned by the judgments given below for saying that, Patrick Flynn's action having been prescribed, the appellant's action was therefore prescribed also, was that that interpretation had been given to Lord Campbell's Act, and that the action under art. 1056 was similar to that under Lord Campbell's Act. It was contended that even under that Act the action by the widow was a fresh action personal to herself, and did not fail because the deceased's action had been barred by prescription. The terms of the Canadian Code, however, must be decisive of this case. Art. 1056 gave the widow a new and independent action totally distinct from that given by a later article to the deceased. It provides that the only limitations thereto should be that the deceased should not have obtained satisfaction for the accident in his lifetime, and that the widow's action should be brought within one year from the death. Reference was made to Con-

solidated Statutes of Canada, c. 78, ss. 1 and 4; Dareau, Des Injures, 55, tit. "Injures par action"; Sourdat, Traité de la Responsabilité, Nos. 33 and 34; *Seward* v. "*Vera Cruz*" (1); *Dibble* v. *New York and Erie Railroad Company* (2).

Abbott, Q.C. (of the Canadian bar), and *Gore*, for the respondent, contended that Patrick Flynn's cause of action arose under art. 2262, being for bodily injuries within the meaning of that article. It was at his death barred by prescription. He was no longer entitled to indemnity and satisfaction, for his right thereto had been extinguished. Art. 1056 does not confer any right of action on the relation of a deceased person where such deceased person had at the date of his death no subsisting cause of action for which he was then entitled to indemnity and satisfaction. This principle has been upheld in England in interpreting Lord Campbell's Act: see *Read* v. *Great Eastern Railway Company* (3); *Pulling* v. *Great Eastern Railway Company* (4); *Haigh* v. *Royal Mail Steam Packet Company* (5); *Griffiths* v. *Earl of Dudley* (6). Reference was made to Consolidated Statutes of Canada (1859), c. 78, s. 1. It was contended, that according to the true construction of that section, the appellant acquired no right of action thereunder. Art. 1056 of the Civil Code was not intended to enlarge the right of action given by the earlier statute. Construed with reference to that statute and having regard to the rules of the old French law on the subject of reparation, it resulted that the appellant had no valid cause of action against the respondent.

Bompas, Q.C., replied.

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July 23.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is an action of damages brought before the Superior Court of the province of Quebec by the appellant, the widow of

(1) 10 App. Cas. 59.
(2) 25 Barb. 183; and in appeal, *Whitford* v. *The Panama Railroad Company*, 23 New York Rep. 484.
(3) Law Rep. 3 Q. B. 555.
(4) 9 Q. B. D. 110.
(5) 52 L. J. (Q.B.) 640.
(6) 9 Q. B. D. 357.

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Patrick Flynn, on her own behalf and as tutrix of their minor child, upon the allegation that the death of her husband, which occurred on the 13th of November, 1883, was the result of bodily injuries sustained by him on the 27th of August, 1882, whilst he was in the service of the respondents, through the negligence of their employés.

The case was tried in April, 1885, before Mr. Justice Doherty and a jury, who found for the appellant, and assessed damages at $2000 to herself and $1000 to her child. The appellant then applied to the Superior Court, sitting in review, to have judgment entered in terms of the verdict; and the respondents moved for a new trial. The Court rejected the appellant's application, and allowed the respondents a new trial upon payment of the costs of the last, and without costs of the motion, upon the ground that the presiding judge had wrongly directed the jury that, in estimating damages, they were entitled to consider the anguish and mental sufferings of the widowed mother and orphan child. That decision was on appeal set aside by the Queen's Bench, who gave effect to the verdict with costs of suit. On appeal from the Queen's Bench the Supreme Court of Canada reversed their decision, restored the judgment of the Superior Court in review, and condemned the appellant in the costs of the appeals to the Queen's Bench and to the Supreme Court of Canada.

On a second trial, in November, 1888, before Mr. Justice Davidson, the jury again found for the appellant, with $4500 damages to herself and $2000 to her child; and thereupon the appellant moved the Superior Court in review for judgment. The respondents moved in the same court for (1.) a new trial, (2.) arrest of judgment, and (3.) judgment in their favour non obstante veredicto. The second and third of these motions were rested on a plea then put forward for the first time by the respondents, to the effect that more than twelve months having elapsed between the death of Patrick Flynn and the date of the injuries which are said to have occasioned it, all right of action competent to him had been extinguished by prescription; and that by law the right of the appellant to recover damages for such bodily injuries was also extinguished before his death. The Court, as its decree bears, heard parties upon all of these motions,

and by a majority of two to one dismissed the respondents' motions, and granted that of the appellant, with all costs of suit not previously adjudicated upon. On appeal by the respondents, the Court of Queen's Bench, consisting of five judges, unanimously affirmed the judgment of the Court below on all points with costs.

The case was then carried by appeal to the Supreme Court of Canada, who, on the 22nd of June, 1891, by a majority of four to one, reversed the decisions of the Queen's Bench in appeal and of the Superior Court in review; dismissed the appellant's motion for judgment; also refused and dismissed the motions made by the respondents "for a new trial and in arrest of judgment"; and granted the respondents' motion for judgment non obstante veredicto, with costs of action in all three Courts. On the application of the appellant, their Lordships humbly advised Her Majesty to grant special leave to appeal against that part of the judgment which sustains the new plea raised by the respondents after the second trial. In making their recommendation, their Lordships were influenced by these considerations—the general importance to the province of Quebec of the question arising upon the construction of its Civil Code; the great difference of judicial opinion which it evoked; and the fact that the decision of the majority in the Supreme Court appears, from the judgment of Mr. Justice Tashereau, to have been based to some extent upon the authority of English decisions. Their Lordships intimated that they would not hear a third appeal upon a motion for new trial involving no question of law, but that, in the event of their sustaining the appeal allowed, they would, if the matter of new trial should prove to be still open to the respondents, remit it for decision to the Court below.

The appellant's claim is founded upon sect. 1056 of the Civil Code of Lower Canada, the first paragraph of which enacts that, "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages

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occasioned by such death." The appellant brought the action within seven months after her husband's decease, while the prescription thus made applicable to her statutory claim was still current. But sect. 2262 (2) of the Code provides that actions "for bodily injuries" are prescribed by one year, "saving the special provisions contained in art. 1056, and cases regulated by special laws." Seeing that Patrick Flynn lived for nearly fifteen months after the date of the injuries which caused his death, their Lordships see no reason to doubt that any claim competent to him against the respondents had been cut off by prescription. Whether the appellant has thereby been deprived of the right of action which, in the circumstances of this case, she would undoubtedly have had under sect. 1056 if he had died during the currency of the prescriptive period applicable to his right, depends upon the construction of the two sections of the Code which have just been referred to.

The Code became law in the year 1866, and sect. 1056 superseded the provisions of c. 78 of the Consolidated Statutes of the then Province of Canada (1859), which, though not identical in expression, were the same in substance with the enactments of the English Statute, 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act. In both statutes a right of action is given, in general terms, to the representative of the deceased, for behoof of his widow and other relations entitled, in all cases where an act or default is such as would, if death had not ensued, have entitled the party injured to maintain an action. Their provisions leave indefinite some things which in the Code are defined. They leave to implication the conditions upon which the right is not to survive, and, by that omission, favour the suggestion that what was intended to pass to the representative was such right of action as the deceased had at the time of his decease. In England the statutory period of limitation applicable to such claims by injured persons is six years. The observations of English judges cited at the bar, and noticed by Mr. Justice Taschereau, did not refer to, and can hardly have contemplated, a case in which that period had elapsed before the death of the injured person. The authorities from which they were taken merely establish that, under the English Act, the representative

can have no right of action, first, where the act or default complained of raised no liability to the deceased, at common law, or by reason of his having contracted to bear the risk of it; and, secondly, where the deceased has been compensated or has settled and discharged his claim. These authorities can have no bearing upon the point raised for decision in this appeal, unless it can be shown that the provisions of the Code are in substance identical with those of the statute to which they have reference.

In the course of the argument, counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether and, if so, how far c. 78 of the Statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of sect. 1056 apply to it, and are in themselves intelligible and free from ambiguity. The language used by Lord Herschell in *Bank of England* v. *Vagliano Brothers* (1), with reference to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), has equal application to the Code of Lower Canada: "The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground.

In so far as they bear upon the present question, the terms of sect. 1056 appear to their Lordships to differ substantially from the provisions of Lord Campbell's Act and of the provincial statute of 1859. The Code ignores the representative of the injured person, and gives a direct right of action to his widow and relations—a change calculated to suggest that these parties are to have an independent, and not a representative right. A difference

(1) 1 App. Cas. 145.

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of much greater importance is to be found in the fact that the Code distinctly specifies certain conditions affecting the right of action competent to the deceased, which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death. These conditions are not expressed in either of the statutes referred to; and, according to a well-known canon of construction, it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives. The first paragraph of sect. 1056, read in its ordinary and natural sense, enacts that the widow and relations shall have a right to recover all damages occasioned by the death from the person liable for the offence or quasi-offence from which it resulted, provided they can shew (1.) that death was due to that cause, and (2.) that the deceased did not, during his lifetime, obtain either indemnity or satisfaction for his injuries.

Assuming, as the jury have found, that the death of Patrick Flynn in November, 1883, was due to bodily injuries sustained in August, 1882, for which the respondents were answerable, then all the conditions requisite in order to give the appellant a right of action have been fulfilled to the letter. The prescription established by sect. 2262 (2) had cut off the deceased's right of action in August, 1883; but the Code does not make it a condition of the right of action given to the appellant by sect. 1056 that her husband's claim shall not have prescribed. That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by a reference to sect. 1138, which enumerates the various ways in which an obligation may be extinguished. The argument of the respondents, if given effect to, would practically add to the language of sect. 1056 words which are not to be found there, such as "and without his claim having been otherwise extinguished," or, in other words, involves the insertion of a new condition which the legislature has excluded.

It appears to their Lordships that, when sects. 1056 and 2262 (2) are read together, it becomes apparent that the de-

ceased's claim in respect of his bodily injuries, and the claim of his widow and relations in respect of his death, were to run separate courses of prescription; and that their claim, which cannot emerge until his death occurs, was not to be either directly or indirectly affected by the provisions of 2262 (2). The saving clause in that sub-section is only intelligible upon the footing that it was meant to treat the death as the foundation of their right of action; to apply to that right the rule of prescription introduced by sect. 1056, and to exempt it altogether from the operation of the prescriptive rule which limited the deceased's claim.

It may be noticed that the provisions of the second paragraph in sect. 1056 are inconsistent with the view that, in order to give a claim to his widow and relations, the deceased must have had a good cause of action at the time of his death. These provisions plainly assume that, on the death of a person dying from wounds received in a duel, his widow and relations would have a good action for all damages thereby occasioned against his antagonist, although he himself could have no right of action, their sole object being to extend liability to others who took part in the duel, whether as seconds or witnesses.

The respondents argued that, in the event of judgment being against them upon the question of the widow's title to sue, the case ought to be sent back to the Supreme Court of Canada, in order that they may be heard upon their motion for a new trial. Having now the record before them, their Lordships are of opinion that the course thus suggested is no longer open. The judgment appealed from bears, inter alia, "That the motions by the appellants (i.e., the present respondents) for a new trial and in arrest of judgment should be and the same were respectively refused and dismissed." As it stands, that is an express adjudication upon the very point which the respondents desire to have reheard; and the Supreme Court of Canada can have no jurisdiction to review it. In order to meet that difficulty, the respondents suggested that the decerniture was inserted per incuriam, and that the Supreme Court might strike it out, upon a motion to correct their judgment; and they relied upon the circumstance that the point is not discussed in the opinion of Mr.

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Justice Taschereau. Without clear grounds for doing so, their Lordships are not inclined to protract litigation already excessive. Considering that all the judges, seven in number, who heard the motion in the Courts of Quebec Province, were of opinion that the evidence warranted a verdict against the respondents, that one of them only thought the verdict ought to be disturbed, and that upon the single ground that the damages awarded were too large, their Lordships see no reason to suppose that the judgment of the Supreme Court of Canada was incorrectly framed or that any injustice will be done by their finally disposing of the case at this stage.

Their Lordships will therefore humbly advise Her Majesty to discharge the judgment appealed from, to restore the judgment of the Superior Court in review, dated the 31st of January, 1889, and the judgment of the Queen's Bench in appeal, dated the 19th of June, 1890, and to order the respondents to pay to the appellant her costs of the appeal to the Supreme Court in the second trial. The respondents must also pay to the appellant her costs of this appeal.

Solicitors for appellant: *Freeman & Bothamley.*
Solicitors for respondents: *Bompas, Bischoff & Co.*

[PRIVY COUNCIL.]

WALKER . . . . . DEFENDANT;

AND

BAIRD AND ANOTHER . . . . . PLAINTIFFS.

J. C. 1892 July 19, 20; Aug. 4.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Prerogative—Treaties—Interference with Private Rights—Acts of State.

Quære, whether the Crown has the power of compelling its subjects to obey the provisions of a treaty made either for the purpose of putting an end to war or to preserve peace, or, whether interference with private rights can be authorized otherwise than by the legislature.

Where the Government justified certain acts, in derogation of the private rights of the plaintiff in regard to his lobster fishery, as acts and matters of State arising out of political relations between Her Majesty and the French Government, contending that they involved the construction of treaties and of a temporary modus vivendi for lobster fishing in Newfoundland and other acts of State, and that they were matters which could not be inquired into by the Court:—

Held, that this defence disclosed no answer to the action.

APPEAL from an order of the Supreme Court (March 18, 1891), to the effect that the appellant's defence did not disclose a sufficient answer to the respondents' action.

The statement of claim and defence are set out in their Lordships' judgment.

The judgment of the Court below was that, in an action of this description, to which the parties are British subjects, for a trespass committed within British territory in time of peace, it is no sufficient answer to say, in exclusion of the jurisdiction of the municipal Courts, that the trespass was an "act of State" committed under the authority of an agreement or modus vivendi with a foreign power; and that in such a case, as between the Queen's subjects, the questions of the validity, interpretation, and effect of all instruments and evidences of title and authority rest in the first place with the Courts of competent jurisdiction within which the cause of action arises.

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

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The Attorney-General (Sir *R. Webster*), *Staveley Hill*, Q.C., and *A. T. Lawrence*, for the appellant:—

The acts complained of were done by the appellant in pursuance of orders lawfully given to him by the Crown. Those orders were necessary for the carrying out of an agreement entered into by Her Majesty with a foreign power. Such agreement was a treaty made by Her Majesty by virtue of her prerogative and in lawful exercise thereof. As such it was binding on the respondents. Orders and acts necessary to carry the same into effect are acts and matters of State, and cannot be questioned in any of Her Majesty's Courts. The respondents were using and working their lobster factory in contravention of the treaty, and, in consequence, were committing unlawful acts. The duty of enforcing the due observance of the terms of the treaty had been delegated by Her Majesty to the appellant, and his acts in enforcing the same were not wrongful acts giving a cause of action cognizable by the Courts of Newfoundland.

The principle involved in the defence is this, that the Crown, by its prerogative, can bind its subjects by treaty; that it is an offence by the common law to disobey the provisions of a public treaty of this kind; and that the act of the executive in preventing that disobedience and enforcing obedience does not give a cause of action.

The only question triable in the case was, whether the act of the appellant was within the modus vivendi compact, and was justified and rendered lawful thereby; and that question was sufficiently raised by the defence. [LORD HERSCHELL:—Do you contend that every treaty can be carried out by the executive?] Not all; for instance, treaties involving questions of taxation or torts or cession of territory in time of peace. [LORD HOBHOUSE:—Can the Crown, by treaty with a foreign power, acquire new rights against its own subjects?] No; and it is not contended that the Crown can sanction an invasion by its officers of private rights in order to carry out any kind of treaty. It can only do so when the treaty is to put an end to war or to prevent war; and then the Crown has the power of compelling obedience to its provisions, on public grounds and for the public safety.

[The authorities cited were: 2 Hen. 5, c. 6; 29 Hen. 6, c. 2;

1 Blackstone, p. 257 (5th ed. 1773), c. 7, par. 2; Comyns' Digest, tit. Prerog. D. 3, and *Weymberg* v. *Tough*, 1 Ca. in Ch. pp. 123, 173; Chitty's Prerog. of the Crown, pp. 166, 170; *In re Californian Fig Syrup Company's Trade-mark* (1); *In re Carter Medicine Company's Trade-mark* (2); Kent's International Law (2nd ed. 1878), p. 384; Wheaton's International Law (6th ed.), pt. 3, c. 2.]

In early times, commissioners were appointed to inquire into breaches of treaty. Reference was made to Molloy's De jure Marittimo, bk. 1, c. ix., para. 7; Dicey's Constitutional Law, 8th Lect. (2nd ed.); *The Parlement Belge* (3). [LORD HERSCHELL:—Is there anything on the record to shew the compass of the treaty? Those who drew the defence seem to have taken the widest view, viz., there is a treaty, and that puts an end to the action.] See *Damodhar Gordhan* v. *Deoram Kanji* (4), where the question of treaties of peace and war was discussed. [LORD HERSCHELL:—Is there any case which draws a distinction between those treaties which do and those which do not bind merely by the sanction of the Crown?] No. It was stated that the Crown did not in this case dispute the right of the respondents to be compensated for the loss sustained by an act of State; the contention was that the executive had a right to enforce obedience to treaties like the modus vivendi compact in this case.

Reference was also made to *Sutton* v. *Johnstone* (5); *Feather* v. *The Queen* (6); *Money* v. *Leach* (7).

Sir *J. S. Winter*, Q.C. (Newfoundland), *J. E. C. Munro*, and *Arnold Herbert*, for the respondents:—

The judgment of the Court below was right, for the defence admits the commission by the appellant of an act which but for the alleged authority and ratification from Her Majesty would be a tort. Further than that, the ratification itself is not set up as a justification in law of the act of the appellant, but it is alleged that that ratification involves questions or matters which

(1) 40 Ch. D. 620.
(2) W. N. (1892) 106.
(3) 4 P. D. 129; 5 P. D. 197.
(4) 1 App. Cas. 332.
(5) 1 Term. 493.
(6) 6 B. & S. 257.
(7) 3 Burr. 1742.

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cannot be inquired into by the Court. But the right of Her Majesty to authorize an act committed by one subject towards another is a question which Courts have jurisdiction to determine; for as between Her Majesty and one of her subjects there can be no such thing as an act of State. The alleged agreement or modus vivendi between Her Majesty's Government and the Government of France was not in law binding or obligatory upon the respondents. Consequently, the alleged contravention thereof by the operation of the respondents' factory was not unlawful and affords no justification in law for the appellant's acts. There is no instance of a treaty having been held to affect the private rights of the subject; while there are Acts of Parliament which have been passed to enable treaties to be carried into effect. Reference was made to *Entick* v. *Carrington* (1); Broom's Commentaries, p. 794; Treaty of Utrecht, Art. 13; Treaty of Paris, Art. 5; Treaty of Versailles, Arts. 4, 5; 28 Geo. 3, c. 35; 59 Geo. 3, c. 38; Chalmers' Opinions, Colonies, &c., 2nd vol. (ed. 1814), pp. 328, 337; North American Parliamentary Papers, vol. 1, Opinion of Sir R. Palmer; vol. 2, Opinion of Sir A. Cockburn.

No case can be found in which the Crown has attempted in time of peace to affect by treaty the private rights of its subjects. For that purpose an Act of Parliament is necessary. With regard to State necessity, that must relate to the power of the Crown to make a treaty apart from its binding force upon private individuals and private rights. There is no authority for saying that State necessity will make a treaty binding upon subjects by force of the prerogative. Such a doctrine would extend the prerogative of the Crown so as to enable it to deprive the subject of his property and rights. If necessity is to override law, it is not sufficient for the appellant to shew a necessity for the treaty; but he must shew a necessity for the particular mode of carrying it into effect—that is, for doing so without an Act of Parliament. For instances in which Acts of Parliament were passed in order to carry out and enforce treaties, see Hertslet's General Index, p. 173; 28 Geo. 3, c. 35; 5 Geo. 4, c. 51, continued by 2 & 3 Will. 4, c. 79; 2 & 3 Vict. c. 96; Herts. vol. v. p. 86, 95, 96;

(1) 19 State Trials, 1030; 2 Wils. 275.

3 & 4 Vict. c. 69; 5 & 6 Vict. c. 63; Herts. vol. vi. p. 343; 6 & 7 Vict. c. 79; Herts. vol. vi. 453; 18 & 19 Vict. c. 101; Herts. vol. x. 86; 31 & 32 Vict. c. 45; Herts. vol. xiii. 422; 40 & 41 Vict. c. 42, s. 15; 46 & 47 Vict. c. 22; Herts. vol xv. 952. For an instance in which a treaty was not carried out, see *In re Carter Medicine Company's Trade-mark* (1). Reference was also made to an opinion of the law officers, June 3, 1728; Chalmers' Opinions, ed. 1814, 2nd vol. pp. 339–42; *Ware* v. *Hylton* (2); 1 Halleck Int. Law, p. 261–2; Cooley's Const. Law, p. 103.

Sir *R. Webster*, replied.

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The judgment of their Lordships was delivered by

LORD HERSCHELL:—

This is an appeal from an order of the Supreme Court of Newfoundland. The respondents by their statement of claim alleged that the appellant wrongfully entered their messuage and premises, and took possession of their lobster factory and of the gear and implements therein, and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory.

By the statement of defence the appellant said that he was captain of H.M.S. *Emerald*, and the senior officer of the ships of Her Majesty the Queen employed during the current season on the Newfoundland fisheries; that to him, as such senior officer and captain, was committed by the Lords Commissioners of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving effect to an agreement embodied in a modus vivendi for the lobster fishing in Newfoundland during the said season, which as an act and matter of State and public policy had been by Her Majesty entered into with the Government of the Republic of France; that the said agreement provided, amongst other things, that on the coasts of Newfoundland where the French enjoy rights of fishing conferred by the treaties, no lobster factories which were not in operation on the 1st of July, 1889, should be permitted, unless by the joint consent of

(1) W. N. (1892) 106. (2) 3 Dallas, United States Sup. Ct. Rep. 199, 273.

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the commanders of the British and French naval stations; that the said lobster factory of the plaintiffs being situate on the said part of the coasts of Newfoundland, and being one that was not in operation on the said 1st of July, 1889, and one which was without the consent aforesaid being used and worked by the plaintiffs as a lobster factory whilst the said agreement was in force, and such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant in performance of his duties did for the cause assigned enter into and take possession of the messuage and premises in the statement of claim mentioned, and of certain gear and implements; that such entry into and taking possession of the said messuage and premises, gear, and implements, were made and done by the defendant in his public political capacity, and in exercise of the powers and authorities, and in performance of the duties committed to him, and were acts and matters of State done and performed under the provisions of the said modus vivendi; that the action taken by the defendant in putting in force the provisions of the said modus vivendi had with full knowledge of all the circumstances and events been approved and confirmed by Her Majesty as such act and matter of State and public policy, and as being in accordance with the instructions of Her Majesty's Government. The defendant submitted that the matters set forth in his answer to the statement of claim, and on which he rested his right to enter and take possession of the premises, were acts and matters of State arising out of the political relations between Her Majesty the Queen and the Government of the Republic of France, that they involved the construction of treaties and of the said modus vivendi and other acts of State, and were matters which could not be inquired into by the Court.

The plaintiffs objected that the defence did not set forth any answer or ground of defence to the action, and it was ordered by the Court that the points of law should be first disposed of. The Supreme Court of Newfoundland, after hearing argument, held that the statement of defence disclosed no answer to the plaintiffs' claim, but gave the defendant leave to amend.

In their Lordships' opinion this judgment was clearly right,

unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable.

The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the Court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitors for respondents: *Burn & Berridge.*

[HOUSE OF LORDS.]

H. L. (I.) 1892 May 23.

SIR ROBERT HERRON AND OTHERS . . APPELLANTS;

AND

THE RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS . . RESPONDENTS.

Waterworks—Reservoir—Exercise of Statutory Powers—Deviation, lateral—Construction of Works unauthorized by Statute—Injunction.

Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any Court remodel arrangements sanctioned, or relax conditions imposed, by Act of Parliament.

Deviation, in its ordinary and natural sense and as used in Acts of Parliament, means shifting the work in its integrity from one site to another which may be deemed more suitable. It does not imply a right not only to alter the situation of the work but in doing so to dispense with a half or two-thirds of it.

A local and personal Act empowered commissioners to take water from a river for the supply of a township on condition of their executing certain works and (inter alia) a reservoir to supply compensation water to mill-owners, and a conduit, the reservoir to be constructed by an embankment across the river. The Act and the relative plans and sections described the position of the reservoir, its contour and capacity, and the height of the embankment, and provided that in constructing the authorized works the commissioners might subject to the provisions of the Act deviate from the lines of the works to any extent not exceeding the limits of lateral deviation shewn on the deposited plans, and from the levels shewn on the deposited sections, in the case of the reservoir to any extent of lesser height which would enable the commissioners to give a sufficient supply of water for compensation purposes; but the commissioners should not in the exercise of the power of lateral deviation thereby given construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shewn on the plans with reference to the corresponding embankment or wall and six feet in addition.

In constructing the reservoir the commissioners curtailed it by more than one-third of its length and nearly two-thirds of its capacity, and placed the embankment higher up the river than the point fixed by the Act and so that the capacity could not be enlarged in the event of the supply of compensation water proving insufficient. In constructing the

conduit the commissioners disregarded in material points the directions of the Act as to the course and serviceableness of the conduit and constructed a conduit which they alleged was "a substantial equivalent" to the mill-owners. The mill-owners having brought an action against the commissioners:—

Held, reversing the decision of the Irish Court of Appeal (27 L. R. Ir. 179), Lords Morris and Hannen dissenting, that though no actual damage was proved the mill-owners were entitled to a declaration that the reservoir and conduit were not in accordance with the provisions of the Act, and to an injunction restraining the commissioners from taking or using the waters of the river or from interfering with the flow of the river otherwise than as authorized by the Act.

APPEAL from an order of the Irish Court of Appeal reversing a decision of Porter M.R. (1)

The action was brought by the appellants against the respondents. The statement of claim alleged facts which shewed that the plaintiffs were the representatives of a body of persons called in the Act the upper mill-owners, entitled to the flow of water in the River Dodder; that the defendants introduced a bill in Parliament in the year 1880, by which they proposed to divert the water which would otherwise flow into the River Dodder; that the plaintiffs petitioned against the bill; that an agreement was come to by which additions and alterations were made in the clauses of the bill, and the opposition of the mill-owners was withdrawn, and the Act passed in the form agreed to between the plaintiffs and defendants; that the reservoir known as work No. 9, and the diversion of streams or watercourse known as work No. 10, were designed expressly for the protection of the upper mill-owners; that the defendants had constructed the reservoir (work No. 9) in a different position from that defined by the Act, and of a capacity one-third only of the capacity of the reservoir as defined by the Act; that work No. 10 had been constructed in a different position and in a different manner from that defined by the Act; and that the result of the defendants' alterations was to deprive the mill-owners of some of the material benefits secured to them by the Act. The plaintiffs claimed an injunction.

Porter M.R., by whom the action was tried, made an order declaring that the works No. 9 and 10 had not been constructed and

(1) 27 L. R. Ir. 179.

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were not in accordance with the terms and provisions of the Rathmines and Rathgar Water Act 1880, and ordering that a perpetual injunction be awarded to restrain the defendants, their officers, servants, workmen, and agents [from continuing the reservoir No. 9, and the diversion of streams or watercourse work No. 10, in the state and condition in which the same then were, or in any other state or condition than should be in accordance with the terms and provisions of the Rathmines and Rathgar Water Act 1880, and] from taking, collecting, diverting, impounding, storing up, using, or appropriating the waters of the River Dodder, or of any brooks, streams, rivulets, or springs flowing into the said river by the works constructed by the defendants for that purpose, or by any works other than the works described and authorized by the said Rathmines and Rathgar Water Act 1880, and from interfering with the flow of the water in the River Dodder, otherwise than as authorized by the Act: the injunction not to issue until further order.

The Irish Court of Appeal, upon the defendants undertaking to make certain alterations in their constructed works and construct certain other works, discharged the order of Porter M.R., and dismissed the action out of Court save so far as might be necessary for the purpose of enforcing the performance by the defendants of the undertakings aforesaid. Against this decision the representatives of the mill-owners appealed asking that the order of Porter M.R. might be restored except as to that part of it which is enclosed in brackets shewn above and which they agreed to abandon.

The appeal turned entirely on the special clauses of the Rathmines and Rathgar Water Act 1880 (43 & 44 Vict. c. cxxxviii.) which incorporated the Waterworks Clauses Acts 1847 and 1863. The material parts of these clauses and the circumstances of the case are stated in the judgments of Porter M.R. and of Lords Watson and Macnaghten.

1892. Feb. 18, 19, 22, 23. Sir *R. E. Webster* A.G. and *R. M. Bray* for the appellants, the mill-owners, contended that the facts shewed that upon the true construction of the Act the respondents had not, either in the case of the reservoir or the

conduit, fulfilled the statutory requirements provided for the protection of the mill-owners, and that when this was once established the appellants had made out a case for an injunction and need not prove actual damage.

Rigby Q.C. and *D. Fitzgerald* Q.C. (of the Irish Bar), (*J. D. Fitzgerald* with them) for the respondents did not dispute that general proposition of law, but contended that upon the true construction of the Act and with reference especially to the powers of deviation the respondents had complied with the statutory requirements, or would have done so when the works specified by the order of the Court of Appeal were completed.

Sir *R. E. Webster* A.G. in reply.

The House took time for consideration.

May 23. LORD HALSBURY L.C.:—

My Lords, this case raises a most serious and important question—a question not confined to the immediate parties to the litigation, but which involves a principle of construction of all private Bill legislation, having very wide consequences. It is necessary, therefore, to consider what is the system of legislation of which the Act of Parliament now in question is an example.

It may be stated generally, that Parliament in passing a private Act looks to the public advantage and security, and also looks to the interference with private rights. Where a work of any kind has to be constructed Parliament has made an elaborate set of provisions intended to secure to the public the advantages which the promoters propose as the reason for legislation, and as the consideration for the rights of the persons affected, or sought to be affected, by the intended legislation. In dealing with the latter class of questions it has been said that the particular provisions may rather be regarded as words of contract to which the legislature has given its sanction than the words of the Legislature itself.

My Lords, with respect to the mode in which this particular instrument is to be construed, I very heartily concur with the

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language of FitzGibbon L.J. that we "cannot interpret the Act by any reference to the Bill, nor can we determine its construction by any reference to its original form." I also agree that the character and details of the works must be ascertained partly from the deposited plans and sections, and partly from the language of the Act itself. Nor am I to assume any necessary conflict between the two. On the contrary, if it is possible for me, I ought to adopt such a construction as will bring them into harmony. How far the canon of construction which the Lord Justice has laid down, and with which, as I have said, I heartily concur, is consistent with the learned judge's observation that the plans and sections were prepared with substantially different objects, and represent designs from which substantial departures were intended to be sanctioned by amendments made in the Bill during its passage through Parliament; or how, assuming the canon in question to be correct, his Lordship ascertains that a complicated set of works were enacted to be executed for one purpose quam proxime, according to a set of plans designed for another purpose, I confess I am wholly unable to discover. And I think that a great deal of the difficulty which has arisen in the construction of the Act has been due to an à priori presumption that the Act did not mean what it said, and that some explanation of its provisions is to be sought for other than the plain and obvious one arising from the grammatical construction of the words and sentences that it contains.

Now, though I proceed upon the view that all negotiation previous to the Act or the original form of the Bill must be dismissed, yet it is quite true that the subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act they did.

I adopt, as I could not improve, the terse description of the objects of the Act given by Palles, C.B.: "Before the passing of that Act the waters of the upper portion of the River Dodder, and of its tributaries, the Cot Brook, the Slade Brook, and another stream not named in the Act, all of which enter the

Dodder near the town lands of Castlekelly and Glassavullaun, appear to have been adulterated with, or discoloured by, peaty matter, which rendered them less fit for domestic purposes than the waters which flowed into the river lower down, and were free from this discolouration. The general scheme of the Act seems to have been to intercept these discoloured waters, and divert them from the river, so that the waters flowing into that river from tributaries below the point of interception should not be mixed with the upper or discoloured waters. The lower or pure waters were then to be led into a reservoir ('No. 1') from which the supply for the township was to be drawn. The upper or peaty waters were, subject to a power of diversion of part, to be led by a conduit (work 'No. 10') to a point below this and another reservoir ('No. 9'), which I shall afterwards mention, and there to be returned into the river and flow on to the plaintiffs' mills. The power of diversion I have referred to is in respect of the excess over 1500 cubic feet per minute of the waters flowing in this conduit. This excess the defendants were, by their statute, authorized to impound."

Now, I find a whole series of provisions which appear to me to have been intended to effect the objects which the Chief Baron has tersely stated. There was the reservoir (No. 1) as he says from which the supply to the township was to be drawn. No. 9, another and separate reservoir, the object and purpose of its operation being that which the Chief Baron describes, is also provided for in terms as to which I shall have to say more presently. But, stopping there, the scheme of the Act is plain, and referring only to the Act itself, I think it cannot be doubted that it intended that pure drinking water should be supplied to the township, and the interference with private rights which the Act sanctioned was necessary to the main object of providing for the health and comfort of the neighbourhood which the Act describes as the increasing district intended to be supplied with pure water.

But the interference with private rights would immediately suggest to the legislature, even if the parties had not appeared to enforce their claims, that some provision must be made for the continuance to the mill-owners of a supply of water, without

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which their mills might become useless. And, again, taking the Act itself as my guide, I cannot think that it was ever intended that there should be any question of priority or preference between the two objects aimed at. Pure water was intended to be brought to reservoir (No. 1). The compensation works were intended to be supplied by reservoir (No. 9), and the auxiliary work (No. 10).

Now, with regard to No. 9 (and I again quote Chief Baron Palles) it is described as "an impounding reservoir formed on the bed of the river Dodder, and on lands immediately adjoining, and situated on both sides thereof by an embankment, which the section then proceeds to describe with great minuteness. Its site, its total length, its direction as regards the points of the compass, *the point at which it is to cross* the central line of the river, its length on each side of that central line, are all mentioned. The section then states the length (1700 yards) of the reservoir, measured from such embankment, and the point at which the reservoir is to terminate."

These directions, minute and particular as they are admitted to be, are rendered to my mind the more emphatic by the word "thereabouts," which seems to me designed to cover any trifling and accidental inaccuracy in the measurements; and I believe as to the effect of that word there is no difference of opinion among the learned judges. Now, if it is possible to give any construction to these words consistently with the other parts of the Act, it would be to sin against a very plain canon of construction to reject them as inoperative. On the face of them they appear to be the result of minute and careful calculation. Dealing with the particular construction, a reservoir, it is obvious that the site was a subject-matter to which Parliament would presumably have careful regard. The appropriateness of the site selected, the security in respect of the sub-soil, and the like, are matters upon which Parliament undoubtedly does occupy itself, and with respect to which, unless it did make due provision, the main object of the work and the security of the neighbourhood might both be imperilled.

If so wide a latitude were given to the limits of deviation as is now insisted on, it is clear that not only the site pointed out

for the intended reservoir, but every other alternative site which upon that hypothesis would be within the limit of deviation selected by the undertakers, should equally be the subject of investigation and evidence. This would most certainly be a serious consequence in respect of the costs incurred, not to speak of the difficulty of arriving at a decision where so many alternative schemes would be presented to the mind of the committee as are to be implied by the extension of the function of the limits of deviation, though, as a matter of fact, alternative schemes for such a purpose may not, according to the Standing Orders of Parliament, be expressly presented.

It cannot certainly be denied that upon the hypothesis adopted by the Court of Appeal, all the measurements are useless, and, in fact, nineteen out of twenty-two lines, of which subsect. 9 of sect. 9 consists, must be entirely rejected. This is a startling proposition. It is said that the 13th section authorizes such a construction. It seems to me that the construction even of the words "the limits of lateral deviation" strikes out the word "lateral" in that section. I do not find the words "vertical deviation" in the section at all. The words of the 13th section, "the levels," which seem to me to be alone appropriate to the matter under debate, are described to be "a deviation from the levels shewn on the deposited sections in the case of reservoir (No. 1), and a deviation from the levels shewn on the deposited sections in the case of reservoir ('No. 9')."

The first observation that arises on the construction of sect. 13 is, that it is a section always introduced into private Bills of this character, and is known by the name of the noble Lord who first introduced it, its introduction being due to the catastrophe at Holmfirth. And it is manifest that the words "subject to the provisions of this Act," according to ordinary principles of construction, would mean that the powers thereafter given in the section were not to alter, control, or nullify any express provision in the statute subject to the provisions of which such powers were given. It may be said that these words, "subject to the provisions of this Act," are to be found at the commencement of the 9th section itself, but independent of the fact that in the subsection of that section there are works not defined by exact

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measurement, and therefore upon which the words quoted would operate without interfering with the 9th sub-section at all, I think the Master of the Rolls is most accurate in his observation that deviation from plans cannot mean deviation from that which is not alone shewn on plans, but is the subject of express enactment in words and definition by measurement.

The next observation is, that if a power were intended to be given of altering the site or diminishing the capacity of the intended compensation reservoir, subject only to the test that it should enable the commissioners to give a sufficient supply of compensation water in the terms of the Act, nothing could have been easier than to say so in plain terms. If there is any mode by which the express provisions of the 9th sub-sect. of sect. 9 can be explained with reference to the intended works so as to make the power of what is, I think, not very accurately called "deviation," relied on in the other part of the 13th section, capable of being exercised without destroying so much of the 9th sub-section as I have referred to, it clearly ought to be done, and the impossibility of doing so seems to rest upon the assumption that the containing capacity of the reservoir, in respect of its superficial area, must always be such as must always pond back enough water to fill a reservoir which was to be made on the projected site.

This seems to me the critical portion of the argument; and, that I may not appear to undervalue the Chief Baron's argument, I will give it in his own words: "Now, sect. 9 tells us that the reservoir is to be formed by the construction of an embankment crossing the natural bed of the river. Neither the sections nor the plans and sections seem to contemplate cutting. Its length consequently must be determined by the extent to which the embankment can pond back the water, and must therefore depend upon the height of that embankment. The section defines the length of the reservoir as 1700 feet, and from that and the natural conformation of the ground the minimum height of the embankment necessary for such a reservoir can be determined, and that height (the site of the embankment remaining unchanged and the natural conformation of the ground not being interfered with) is sufficient to determine the capacity

of the reservoir. Such a reservoir as I have indicated would be identical, or nearly identical, with that described on the plans and sections, the storage power of which has been proved to be 75,000,000 cubic feet. The 13th section authorizes any lowering of the embankment which will be consistent with the reservoir being capable of giving a sufficient supply of water for compensation purposes in terms of the Act. Upon the evidence in the cause, the Master of the Rolls arrived at the conclusion that a capacity of 25,000,000 cubic feet would be sufficient to satisfy that condition; and in that conclusion, for the reasons to which I shall hereafter refer in detail, I entirely concur. The section then authorizes a reduction of the capacity of the reservoir to one-third of that which was involved in its description contained in the body of sect. 9. But as an embankment of such lesser height as at the site in question would form a reservoir of the lesser capacity, would be insufficient to pond back the water for a distance of 1700 yards or thereabouts, the reservoir formed by such embankment cannot answer so much of the description in sect. 9 as is in the words 'extending for a distance of 1700 yards, and terminating at a point distant 330 yards or thereabouts,' from the point indicated in the section. It has not been, and could not have been, contended that the words 'or thereabouts' which qualify the distances of 1700 and 330 yards respectively could authorize such a deviation in the length as would thus be necessarily involved in the reduction of the capacity by two-thirds."

Now, I so far agree with the Chief Baron, that I find no trace of any intention to excavate a reservoir, no digging out so as to make an artificial basin; but I think it is carrying that observation too far to assume that everything is to be left in its natural condition, and that it is only the subtending hills, plus the impounding bank and the water impounded, that form the reservoir. The reservoir is an artificial construction, and there is nothing to prevent its being constructed with one capacity, while the containing embankment may be of such a height that only a much smaller space than that made into a reservoir will be covered with water.

Of course it may be said how very absurd to make a reservoir

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with its dimensions prescribed, which make it much larger than the height of the one containing embankment can ever allow it to contain water. But this assumes that the height is to be once and for all time ascertained. I do not think this is so—the test is the sufficiency of the supply to the mill-owners; and if everything is constructed according to the plans, this may be a portion of the work liable to revision.

Now, I can understand that it might well be a subject of debate whether so large a body of water need necessarily be pent back as would be involved in the insistence upon the maximum levels shewn on the plans. It might very plausibly be said: This is the object of our reservoir; these are our plans; we need not make the containing embankment so high if it is found that the supply of compensation water is not capable of being pent back by the height to which we build it. Nothing could be easier, all other things continuing the same, than to raise it, and so accomplish what the legislature had in view. The difference of a few feet over such an area would enormously increase the quantity contained.

It will be observed that such a construction gives effect to all the words of the legislature. A very simple expedient might be in the minds of both the parties to the parliamentary bargain, that any danger to the mills on the one side, or an extravagant demand on the commissioners on the other, which they were unable to satisfy, and would so expose themselves to penalties, would so be avoided. The words of sect. 13 would be satisfied by such a construction, and the express provisions of sub-sect. 9 of sect. 9 would be satisfied.

But now take the other hypothesis—that the reservoir itself is to be shifted higher up the valley, and the same contingency happens. New works would have to be constructed, the whole system disorganised, and the commissioners placed in the alternative of either withdrawing from the Rathmines township what it was the primary object of the Act to attain for them, or allowing the mills to go without their compensation water, and the commissioners to incur penalties. As the Lord Chancellor points out, the change of site renders it incapable of being added to by any increased elevation of the embankment.

Now, in construing sect. 13, I think it is material to observe that the section itself points to the very important distinction between the limits of lateral deviation and the levels shewn on the deposited sections. The general scheme with which the Act was dealing was that of building a containing embankment across a valley at right angles with the course of the stream and, so to speak, making, subject to what I have said before as to the reservoir being an artificial construction, the sides of the valley the lateral containing walls. What is there inconsistent in any part of sect. 13 with the intention of the legislature being that the site of the reservoir should be as shewn on the deposited plans, and as so carefully defined in sub-sect. 9 of sect. 9, and allowing the latitude as to the containing embankment across the stream, provided that the containing embankment gave a sufficient supply of water for compensation purposes in the terms of the Act? So that, to put it very plainly, the reservoir, as a reservoir, as an area for containing water, might be constructed according to the very plan and on the very site contemplated by the statute, but that unless it were necessary the embankment at right angles need not be raised to such a height as would necessarily fill the whole area of the intended reservoir with water.

And I cannot help thinking that the passages in the judgment of the Chief Baron which I have quoted seem to assume that you must treat the reservoir as necessarily full to the extent of all its containing capacity in order to ascertain the length of the reservoir itself. The Chief Baron says: "Its" (that is the reservoir's) "length *must* be determined, as neither the plans nor sections contemplate cutting, by the extent to which the embankment can pond back the water, and must therefore depend on the height of that embankment." Again he says: "As an embankment of such lesser height as at the site in question would form a reservoir of lesser capacity, would be insufficient to pond back the water for a distance of 1700 yards or thereabouts, the reservoir formed by such embankment *cannot answer* so much of the description in sect. 9 as is in the words 'extending for a distance of 1700 yards, and terminating at a point distant 330 yards or thereabouts' from the point indicated in the section."

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I cannot assent to this view. Given every other part of the construction of the reservoir to be that indicated on the plans, it is quite true that the lowering of the embankment would prevent 1700 yards of water being ponded back. But it by no means follows that that will prevent or in any way be inconsistent with 1700 yards of receptacle for water being constructed.

Of course the observation seems, at first sight, to be a cogent one—Why have so large a reservoir when you have no need of it? There is only a containing wall; a lower embankment would necessarily pond back a far less amount of water than so large a reservoir would seem adapted to contain. But the more one remarks on the condition of things with which the statute was dealing, the less cogent seems to be the pressure of such an observation.

I will assume the two parties, the commissioners and the mill-owners respectively, to be engaged in negotiation. Would it be altogether so unreasonable to suppose that the commissioners might suggest, "We will make a reservoir large enough to meet any contingeney which may arise," and the mill-owners on the other hand saying, "Well, if the reservoir is made ready to contain water sufficient for any such contingency, it is immaterial to us whether it is always kept full or not, so that it give us our compensation water; and if you will make that the test of the appropriate height of the embankment, all other things being built in the way that we have agreed upon, we will be content that that embankment may remain at a lower level until the necessity arises for raising it"?

I do not of course know, and cannot even conjecture, whether any such bargain took place; but I am only endeavouring to point out that such an arrangement would not be so unreasonable on the part of either of the parties to the bargain, and that therefore there is nothing absurd in the construction which I place upon the section, inasmuch as if any such bargain were made the section would give effect to it. I think that such a construction would give effect and meaning to the whole of subsect. 9 of sect. 9, and for that reason I am of opinion that is the true construction.

It is obvious to remark, that unless effect is given to the

language of the section the figures 1 and 9 themselves become unmeaning; but the figures 1 and 9 are only a compendious mode of referring to the minute and detailed description given of them in sect. 9. It is only perhaps repeating the same observation in another form; but what would be said, if instead of that compendious form, the minute and detailed description of No. 1 and No. 9 were reinserted at every part of the statute where Nos. 1 and 9 are referred to?

By sect. 41 it is enacted, that "when the commissioners shall commence and so long as they shall continue to discharge from and out of their said reservoirs Nos. 1 and 9 and works the due quantity of compensation water, the same is to be taken by all parties interested as full compensation for all water which the commissioners can collect or divert from the lands draining to the said reservoirs." Treating this as a parliamentary contract in which the parties have contracted the one with the other for a particular scheme of works which each has had the opportunity of considering and judging whether it will be sufficiently adequate for the purpose, that is intelligible enough, and was according to the judgment of each party considered to be adequate compensation, and as such must be accepted, whether it should turn out to be so in fact or not.

But here again, if the latitude insisted on be given to the interpretation of these words, the language of the legislature might have been much shorter. You may strike out the words "from and out of their said reservoirs Nos. 1 and 9," and simply provide that if anyhow the prescribed compensation water be sent into the Dodder, that of itself shall satisfy any claim that may be made.

The truth is, that unless the *mode* of constructing the works is assumed to be obligatory, the whole regulation of mode and manner of giving compensation may be struck out, and only the obligation to give the specified quantity is left in the statute. The legislature has gone into a most elaborate and minute investigation, and legislated accordingly to no purpose whatever.

I am unable to follow entirely the answer which is given by the Court of Appeal to what the Master of the Rolls points out

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by his reference to the Railways Clauses Act and the Waterworks Clauses Act, which limit in a particular way the limits of deviation, giving every effect to the words "subject to the provisions of this Act," which, as I have already said, point in a different direction.

As to the words "of lateral deviation," whether or not a shifting of the site is to be inferred from the variation permitted in respect of the levels is a question with which I have already dealt. But dealing with the sub-section pointed to by the Master of the Rolls, it seems to me it would be a strange application of the 13th section to suppose that it was intended to take the intended work out of the operation of the two statutes referred to by inferences derived from the form of the works under construction. It does not lessen the weight of this observation that sect. 13 is a common, well-recognised, and well-known section placed in all Waterworks Acts, and if the construction insisted on be accurate, must be construed hereafter as qualifying and cutting down the limits insisted on in the Waterworks Clauses Act, 1847, inasmuch as I believe ever since the Holmfirth catastrophe the clause in question has always been inserted as part of every new Waterworks Act; at all events, wherever embankments were necessary for the purpose of creating reservoirs.

With respect to the existing capacity of the reservoir No. 9 as constructed, I do not understand that it is contended by the respondents' own witnesses that No. 9, unaided by No. 1, would be sufficient, and some question was debated at the bar as to the priority of rights between the inhabitants of Rathmines and the mill-owners in respect of the several reservoirs designed under the Act.

My Lords, I do not think it is accurate to speak of priority in respect of the two reservoirs in question. The design and purpose of the Act of Parliament, as expressed in its own terms, is that No. 1 should supply drinking water to the district. The design of No. 9 was for compensation water to the mill-owners, and I do not think the Act of Parliament ever contemplated a conflict of rights between the two. I think the obligation to supply the district with water from No. 1 is as great as the

obligation to supply the mill-owners with their compensation water from No. 9.

It was argued, to be sure, that under sect. 41 the commissioners were expected to give their compensation water from No. 1 as well as from No. 9; but I think that is a misreading of the section. When one considers that the overflow from No. 1 must necessarily flow down and reach those who are to have a right to the compensation quantity, it is obvious that the draftsman in enacting what should be full compensation was quite right in including No. 1 and No. 9 as possible sources of supply for such purpose. Otherwise it might have been suggested, that unless the whole compensation water came from No. 9, although there was ample overflow from No. 1, the compensation was not such as to estop all parties interested from claiming more. But the whole principle and purpose of the statute seems to me to be only reconcileable with the view that reservoir No. 1, in its main object and purpose, is to be constructed for the supply of pure and wholesome water sufficient for the domestic use of the inhabitants of all the houses in the township, and by sect. 40 it is enacted that such supply *shall*, apart from unavoidable accident or contingency, be constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within the township.

While I regret my inability on this part of the case to concur with the conclusions at which the Court of Appeal arrived, I am glad that I am not, to use the language of Barry L.J., compelled to place on this statute a construction which was never contemplated by its author. I concur with him that the most conspicuous of the safeguards "against injustice to individuals in private legislation are the provisions (either legislative or by parliamentary rules) requiring the utmost publicity to be given to the intended works, and the deposit of plans and specifications in a public depository, enabling those who are likely to be affected by the proposed operations to see to what extent their rights would be so affected." He adds (and I entirely concur with him), that if the particular construction (which nevertheless prevailed on himself) were adopted the policy of those provisions and of those legislative safeguards

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would have been in no sense carried out or observed. I cannot forbear quoting his Lordship's words as encouraging me in the view which I have taken, that the view which he has adopted led to the results which he thus describes: "I assert that a man of average, or even far beyond average, intelligence, taking up these plans and specifications, would not have the faintest idea that such an alteration as was made in reservoir No. 9 from its delineation on the plans was within the limits of legal possibility, and I am convinced that if the plaintiffs had apprehended such a result, and accordingly resisted the 13th section as framed, it would not have been sanctioned by the committee. It required the afterthought of one of the most skilful engineers —an old friend of mine, Mr. Hassard—it required skilful study and afterstudy to grasp the possibility of such an operation. It appears to have escaped the apprehension of the Master of the Rolls, a most acute judge; and it required all the ingenuity of this Court to arrive at such a construction of the 13th section."

With respect to work No. 10, I have nothing to add to that which the Master of the Rolls has pointed out as the divergence between the work executed and the work authorized by Parliament. I am not so clear that the matter is so immaterial as some of the learned judges in the Court of Appeal appeared to consider it; but as I concur with them that it is an infringement of the plaintiffs' rights, I do not think it necessary to give any elaborate judgment on the subject.

In the result, I have to move your Lordships that the order of the Court of Appeal be reversed; that the injunction ordered by the Master of the Rolls be restored, with a slight modification, to which, as I understand, the appellants did not object; and that the respondents do pay to the appellants the costs both here and below.

LORD WATSON:—

My Lords, the appellants are interested in mills situated upon or near the river Dodder, which are wholly or partly worked by water-power derived from that stream. The respondents, who are commissioners under a series of local statutes, obtained, in the year 1880, an Act enabling them to take water from the

Dodder for the supply of the Rathmines and Rathgar township.

The general scheme of the Act is simple enough. It authorizes the construction of two impounding reservoirs, to be formed on the bed of the Dodder, by means of embankments placed across and nearly at right angles with the course of the river. The upper, known in these proceedings as No. 1 reservoir, is designed for the storage of water fit to be used for domestic purposes by the inhabitants of the township; whilst the lower reservoir, known as No. 9, is intended to furnish a supply of compensation water to the appellants and other parties having an interest in the mills below. The higher waters of the Dodder, being of a peaty character and unsuitable for household use, are to be intercepted, at a point about 1200 yards above reservoir No. 1, and being thence conveyed past both reservoirs by a conduit known as No. 10, are to be returned to the bed of the reservoir river. No. 1 draws its supply of water from the drainage area of the Dodder, in so far as that area is untainted by peat. Reservoir No. 9 is fed partly by the overflow from No. 1, and partly by the diverted peaty water, the respondents having power to appropriate the surplus from conduit No. 10 whenever its flow exceeds 1500 cubic feet per minute.

The appellants allege that neither the reservoir No. 9 nor the conduit No. 10 has been constructed in accordance with the provisions of the Act, and on that ground they ask an injunction against the respondents continuing to impound the water of the Dodder, or to interfere with its natural flow. The respondents do not dispute that they obtained right from the Legislature to take water for the supply of the township upon condition of their executing the works prescribed by the Act, including the works which were intended for the protection of the mill-owners. Until these have been completed in terms of the Act, the respondents' right to abstract water from the river does not emerge. There is practically no controversy as to the character of the works which the respondents have executed. Whether, as executed, these works comply with the requirements of the Act is a question depending upon the construction of its enactments.

Sect. 9 of the Act empowers the respondents to make and

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maintain in the lines and according to the levels shewn on the deposited plans and sections the various works therein described. One of these works is the "impounding reservoir (herein called work No. 9)" to be formed by an embankment 200 yards in length across the river, at a point 900 yards or thereabouts above Fort Bridge, "the said embankment being situated as follows: viz., a length of about 77 yards being on the eastern, and a length of about 123 yards being on the western side of the said river respectively, the said work No. 9 commencing at the said embankment, and extending thence in a southerly direction for a distance of 1700 yards, or thereabouts, and terminating at a point distant 330 yards, or thereabouts, measured down the centre of the said River Dodder, from the point where the centre of the embankment of the said work No. 1 (the upper reservoir) crosses the said River Dodder." The deposited sections shew the embankment of No. 9 to be 80 feet in height above the level of the bed of the river, at the point described in the Act. The reservoir thus described in the Act and relative plans and sections, forms a basin capable of containing 467,250,000 gallons of water.

The compensation reservoir which the respondents have constructed, as representing No. 9, has its embankment about 750 yards higher up the river than the point fixed by sect. 9 of the Act. The height of the embankment above the bed of the river is 55 instead of 80 feet; the length of the basin thereby enclosed is 1100 instead of 1700 yards; and its maximum of storage capacity is only 160,452,000 gallons. As to these facts there is really no dispute. The result of the respondents' operations has been to curtail the reservoir described in sect. 9 by more than one-third of its length and by nearly two-thirds of its capacity.

The discrepancy between the reservoir made and the reservoir described in the Act is very considerable. The main and the most plausible ground upon which the respondents maintain the competency of their admitted departure from the deposited plans and sections is to be found in the powers to deviate, horizontally or vertically, conferred upon them by sect. 13 of the Act. That clause provides that in the construction of the authorized works the respondents may, subject to the provisions of the Act,

"deviate from the lines of such works to any extent not exceeding the limits of lateral deviation shewn on the deposited plans, and from the levels shewn on the deposited sections, in the case of No. 1 to any extent not exceeding six feet, and, in the case of reservoir No. 9, to any extent of lesser height which will enable the commissioners to give a sufficient supply of water for compensation purposes in terms of this Act." Then follows a proviso, not happily expressed, which throws some light upon the preceding context, and was obviously meant to protect the community from the risk of inundation. It is in these terms: "but the commissioners shall not, in the exercise of the power of lateral deviation hereby given, construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shewn on the plans with reference to the corresponding embankment or wall, and six feet in addition."

I see no reason to doubt that, subject to the provisions of the Act, sect. 13 gives the respondents power to deviate laterally, in any direction, all or any of the works authorized, within the limits shewn on the deposited plans. In some instances the position of the work is so precisely defined by the Act as to exclude the possibility of deviation. In others, the possible extent of deviation is necessarily restricted by the character of the work prescribed. Thus the reservoirs No. 1 and No. 9 must be formed, not by excavation, but by means of an embankment across the river, so that neither of them can be deviated laterally, in the sense which these words generally bear in a railway statute.

Accordingly, the only practical way in which the respondents have power to deviate the reservoir No. 9 is by shifting it up or down the course of the river. That can only be effected by changing the site of the impounding embankment. But it is, in my opinion, a very material circumstance that the embankment is not of itself an authorized work within the meaning of the Act; it is merely part of an authorized work, namely, the reservoir as described in sect. 9. The only statutory power which the respondents possess is to deviate, not the embankment, but the reservoir. Deviation, in its ordinary and natural sense, and also

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in the sense in which, so far as I am aware, it has invariably been used in Acts of Parliament, simply means shifting the work in its integrity from one site to another which may be deemed more suitable. It does not imply a right, not only to alter the situation of the work, but in doing so to dispense with a half or two-thirds of it. A work consisting of a basin to be formed by embanking the lower end of a natural hollow cannot be shifted with the same absolute precision as an artificial excavation; but the process of shifting ceases, in my opinion, to be deviation when it is accompanied with a substantial diminution of the possible capacity of the basin. It has been suggested, that in this case the power to deviate "from the lines" of the work means something different from deviation. I venture to think not. The deviation of either reservoir necessarily involves a departure from its lines as shewn on the statutory plan. When the Legislature has specified, with much minuteness, the size and contour of basins like these, it appears to me that a subsequent power to deviate from their lines is simply a power to alter the shape and position of the works, without interfering with their capacity.

It was argued for the respondents that, when the whole provisions of the Act are taken into account, they are under no obligation to place the embankment of reservoir No. 9 in such a position that it might be made to impound the amount of water which the reservoir, as described in sect. 9, would be capable of containing; and that the requirements of the Act are fully met by their constructing a reservoir of much lesser capacity, if that reservoir, together with reservoir No. 1, can afford a sufficient supply of compensation water during periods of drought. The argument was based on the assumption that the mill-owners have a right to the water of reservoir No. 1, whenever the supply from No. 9 runs short, paramount to the claims of ratepayers within the township. Your Lordships were also referred to affidavits lodged by the respondents, in order to shew that, according to their construction of the Act, the lower reservoir which they have made, when supplemented by the upper, will at all times be sufficient for the purposes of compensation.

Sects. 24 and 26 enact that the respondents shall cause to flow

into the River Dodder for the use of the mill-owners in the course of every week a quantity of water not less than 14,700,000 gallons, to be discharged into the river, in a regular and continuous flow, at the rate of 2,450,000 gallons during each working day of twenty-four hours. Then sect. 41 declares that so long as they continue to discharge the due supply of compensation water "from and out of their said reservoirs, Nos. 1 and 9, and works," the same shall be accepted by all parties interested as full compensation for all water which the respondents can collect or divert from the lands draining to the said reservoirs. The suggestion of the mill-owners' preferable claim to the water of reservoir No. 1 is founded upon the words just quoted; but they do not appear to me to support the theory, or to do more than express the fact that the surplus water of No. 1 goes to reservoir No. 9. The primary use of No. 1 is for the supply of water to the inhabitants of the township; and the enactments of sect. 48, which are imperative and not permissive, are absolutely inconsistent with the idea that the right of these inhabitants to a full and constant supply at high pressure from the upper reservoir was meant to be subordinated to the right of the mill-owners to get compensation water from that source to their disadvantage. Not only so, but the provisions of sect. 13 shew that the Legislature intended the reservoir No. 9 to be of sufficient capacity to enable the respondents "to give a sufficient supply of water for compensation purposes."

In my opinion, the evidence adduced by the respondents in regard to rainfall, and the sufficiency of their two reservoirs to afford a sufficient supply of compensation water during dry seasons, is, in the circumstances of this case, irrelevant. The Legislature might have been contented with laying an obligation upon the respondents to supply a daily amount of compensation water, leaving them to judge as to the situation and capacity of the reservoir which would be required for that purpose. But the Legislature has not seen fit to adopt that course, and the Act is not framed upon that footing. Not only is the obligation imposed, but for the protection of those who are interested in its fulfilment the works are prescribed by means of which it is to be carried out. These works are described in language which

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is precise and free from ambiguity; and whilst a power is given to deviate, no power is given either substantially to alter them or to dispense with their execution. There is a provision in sect. 13, upon which the respondents relied, to the effect that they may lower the level of reservoir No. 9 to any extent of lesser height which will enable them to give a sufficient supply of compensation water. What they have done is not, in my opinion, warranted by that or by any other enactment. They have kept the embankment at its greatest permitted height above the datum line, but have moved it so far up the river that the basin which it forms is incapable of holding, even in case of emergency, more than 160,452,000 gallons. To my mind it is perfectly plain that the Legislature never intended the power of lowering the embankment to apply to any reservoir having these as its maximum dimensions. It was meant to apply either to the reservoir specifically described in sect. 9, or to a deviated reservoir having substantially the same capacity, so that if the lowered embankment was found insufficient to give a supply of compensation water it might be raised as occasion required.

In constructing the conduit No. 10, which is intended to intercept and convey the peaty waters of the Upper Dodder, the respondents have certainly taken great liberties with their Act of Parliament. Sect. 9 enacts that the conduit "shall be continued past both reservoirs" and terminate by a junction with the Dodder, at a point about 600 yards above Fort Bridge. Sect. 11 describes its course with still greater precision. It is to be "extended past both the reservoirs called works Nos. 1 and 9"; and the waters of the streams in the townlands of Allagour, Ballinascorney Lower, Belgard Deer Park, and Ballymaice, which adjoins the lower end of reservoir No. 9 on the west, are to be intercepted by it, and conveyed into the River Dodder below the embankment of No. 9. Instead of following these very plain directions, the respondents have extended the conduit past reservoir No. 1 and then carried part of the water, by means of a pipe capable of conveying 1500 cubic feet per minute, under reservoir No. 9, which discharges itself into the bed of the river below the embankment, the surplus water finding its way into the reservoir. It is unnecessary to consider whether,

in ordinary circumstances, the device of conveying water by means of a pipe below a reservoir is a statutory equivalent of carrying it past the reservoir. In this case the device is obviously insufficient to satisfy the requirements of the Act, because a pipe laid along its bottom cannot intercept and carry off water draining into the edge of the reservoir. The Court of Appeal has held that the execution of some minor works will be sufficient compliance with the Act so far as regards No. 10. They do not say that No. 10 will then be in statutory form, but that it will be a substantial equivalent. I demur to a principle which introduces into a local Act prescribing the execution of works described in detail the implied alternative of "such equivalents for said works as a Court of Law or Equity may sanction." The Legislature intends that to be done which it says shall be done, and nothing else.

For these reasons I am unable to concur in the very elaborate judgments of the Court of Appeal in Ireland. It appears to me that, in constructing the reservoir No. 9 and the conduit No. 10, the respondents have failed to comply with statutory provisions which were enacted by the Legislature in the interest and for the protection of the appellants. The only remedy which a Court can give is by enjoining the respondents to desist from interfering with the water of the the River Dodder until the Act has been complied with; and in my opinion the appellants are entitled to that remedy. At the same time I have much sympathy with the ratepayers of the township, and I willingly accede to the suggestion that an injunction should not issue until the respondents have had an opportunity of repairing or obviating the errors which they have committed. I think the appellants ought to have their costs both in this House and in the Courts below.

LORD MACNAGHTEN:—

My Lords, the Act which the Rathmines and Rathgar Commissioners were "authorized and required" to carry into execution is concerned with an undertaking of a somewhat complex character. At the expense of the ratepayers of the Rathmines and Rathgar township the commissioners were to provide a supply of water for the use of the township to be paid for by the

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consumers, and another supply free of charge for the use of certain persons described in the Act as "The Upper Mill-owners," who were at the time in possession of rights with which the supply for the township would necessarily interfere.

In its main features the scheme of the Act is intelligible enough. The River Dodder, on which the works were to be constructed, was fed in its upper sources partly from a large tract of bare hill ground yielding water suitable for domestic purposes, and partly from boggy lands where the water is impregnated with peat and unfit for domestic use. The gist of the scheme was to keep these waters separate and distinct, to impound the clear water in a reservoir formed by an embankment across the bed of the river, and described in the Act as reservoir No. 1, from which the township was to be supplied, and to impound part of the peaty water in another reservoir formed in the same way lower down the valley and described as reservoir No. 9. From this reservoir a limited but continuous flow, regulated in accordance with the wants and directions of the millowners, was to be sent down during working hours. The rest of the peaty water was to be conveyed into the channel of the Dodder by a conduit No. 10 "continued past both reservoirs," and in a position to receive the waters of certain streams, not of any large size, but still of sufficient importance to be mentioned in the Act, on the left bank of the river and to the west of reservoir No. 9.

If the Act be compared with the deposited plans to which it refers, it will be seen that the Bill must have undergone some alteration during its progress through Parliament. But it cannot, I think, serve any useful purpose to speculate upon the extent or character of the change. What your Lordships have to do is to construe the Act as it stands, reading the whole Act together. An attempt to trace or measure the steps by which the project reached its final stage is, I think, very likely to prove misleading. If one takes an Act of Parliament to pieces in that way one is apt to give too much weight to some of its provisions, and too little to others.

Whatever may have been the scope of the undertaking as originally proposed, it now divides itself into two parts open to very different considerations. From a ratepayers' point of view,

reservoir No. 9 is merely an expense and an incumbrance. It brings the commissioners no revenue. To the inhabitants of the township it is no benefit. Self-interest and a sense of duty to their constituents would, no doubt, lead the commissioners to carry out the rest of the works in the most complete and perfect manner possible. The mill-owners have only the Act to look to. They cannot hope for more than their bare rights. In point of form all the works are treated as if they were on the same footing. They are all contained in one and the same section. They are all described with equal minuteness. The language applied to them all, except to the continuation of No 10, which was evidently not in the original plan, is permissive only. But the provisions in which the mill-owners are interested are obviously the price which the township was required to pay for permission to interfere with their rights. And it cannot I think be disputed, that when the commissioners, under the authority of the Act, proceeded to intercept the waters which would otherwise have been available for the use of the mill-owners, it became obligatory upon them to complete the works designed for compensation purposes, just as much as if those works had been contained in a separate section declaring their purpose, and speaking, not in the language of permission, but in the language of command.

The principles applicable to such cases are well settled. Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment, so far as it makes provision on his behalf. It is idle for the promoters to say that they have given him all that he can want, or something just as good as that which the Act required them to give, or even something still better, if he only knew his own interest. It is enough for him to shew that the thing which is offered is not the thing which the Act said he was to have. It is too late to call for a fresh deal at that stage of the game. Nor is it I think within the province of any tribunal to remodel arrangements sanctioned by Parliament, or to relax conditions which the Legislature has

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thought fit to impose. If the promoters say that the alterations complained of are not important enough to justify the intervention of the Court, it is for them to make out that defence. And they must, I apprehend, make it out clearly and satisfactorily.

Now what does the Act say the mill-owners were to have? They were to have all the peaty waters up to a flow of 1500 cubic feet per minute returned into the course of the Dodder by means of conduit No. 10. They were also to have a continuous flow of 14,700,000 gallons per week discharged during working hours from and out of reservoir No. 9. The conduit and the reservoir are only means to an end. But the mill-owners are entitled to have the end secured by seeing that the prescribed means are ready and complete in accordance with the directions of the Act.

Reservoir No. 9 is described and defined in the Act with the utmost care and precision. It was to be formed "by an embankment 200 yards in length" placed across the bed of the River Dodder. The point at which the embankment was to be constructed is fixed by a measurement of "900 yards or thereabouts" from a specified point. There was to be "a length of about 77 yards" on one side of the river, and "a length of about 123 yards" on the other. The reservoir was to extend up the river "for a distance of 1700 yards or thereabouts," and it was to terminate at a point defined in the Act.

There is no discrepancy between the drawings of reservoir No. 9 in the deposited plans and the verbal description of it in the Act. Here at least the enactment prescribes the very thing which the plan indicates. I cannot see why the Court of Appeal should treat Reservoir No. 9 as a relic or fragment of some discarded scheme when the Act speaks of it as an integral portion of the authorized undertaking. At the same time, I do not forget the powers of deviation which are contained in a subsequent section. The extent and limits of those powers will be considered presently.

Conduit No. 10, which is explained to be "a diversion of streams or watercourse," is also minutely described. The point of commencement is defined. It was to be "continued past both

reservoirs," and to terminate by a junction with the River Dodder "at a point about twenty-eight chains measured up stream" from a bridge known as Fort Bridge.

For supplying reservoir No. 9 the commissioners are authorized to have recourse to conduit No. 10 when its flow exceeds 1500 cubic feet per minute, and to take all the excess. Besides this source of supply, the overflow from reservoir No. 1 would necessarily find its way into reservoir No. 9.

Such being the specification of the compensation works contained in the Act, how have the commissioners carried them out? They have moved the embankment of the compensation reservoir from the place where it ought to have been constructed 750 yards higher up the course of the Dodder, and they have built it to the full height shewn on the deposited sections. The result is that the reservoir is shortened by something like half a mile, its storage capacity is reduced by two-thirds, and in the position where it is placed it is impossible to make it substantially larger. Then, instead of carrying conduit No. 10 by an open channel past both reservoirs, the commissioners have carried it by a pipe underneath the lower reservoir, where it is hidden from view, difficult to get at in case of an accident, and, moreover, incapable of intercepting the waters of the streams to the west of the lower reservoir to which I have already referred.

It was not disputed that, unless some authority can be found in the Act itself for these alterations, the mill-owners are entitled, in substance, to the relief claimed in the action. The defence, and the only defence at your Lordships' bar, was that sect. 13 of the Act, which deals with "limits of deviation," contains the necessary authority.

If your Lordships turn to sect. 13, you will observe that there is nothing special or unusual in it, except where it refers to reservoir No. 9. In other respects the section is in common form. The power of lateral deviation is neither greater nor less than that which is to be found in all Acts authorizing the construction of waterworks. "In the construction of the works" the commissioners are empowered, "subject to the provisions of the Act," to deviate from the lines of the works to any extent, not exceeding the limits of lateral deviation shewn on the

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deposited plans. Then the section deals with vertical deviation. Apart from the exception I have referred to, there is nothing special there. It ends with the clause which was introduced in consequence of the Holmfirth disaster in 1876, and which provides that, "in the exercise of the power of lateral deviation," the commissioners shall not "construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shewn on the plans with reference to the corresponding embankment or wall," and a certain number of feet, in this case six feet, "in addition." The language of the section is certainly not happily chosen. Deviation, properly speaking, means departure from a way or course, not departure simply. It is rather difficult to get rid of the impression that lateral deviation in the present case must mean departure sideways from the course or line of the works along the Dodder. But I must say that, on consideration, I think it is clear that the section does authorize the movement of the lines of the works in any direction on the horizontal plane shewn on the deposited plans. It is enough to say that the last clause of the section proves that to be the meaning and effect of the power of lateral deviation. I will not labour the point further, because I venture to think that it is not worth one tenth part of the time and trouble which have been spent over it. When you have arrived at the conclusion that in this respect the Court of Appeal were right, you have got a very little way towards the solution of the question at issue.

If the matter had rested there, and if there had been nothing special in sect. 13, I doubt whether the Court of Appeal would have held that the works complained of were authorized by the Act. Surely powers of deviation in Acts of this sort must be construed reasonably. They must be construed so as to give effect to the provisions and specifications contained in the Act—not to defeat or destroy them. They are in their nature ancillary and subordinate powers; and I quite agree with my noble and learned friend Lord Watson as to what deviation is and what it is not. If you move inwards one of the lines or sides of a prescribed work so as to efface or cut off a substantial part of the design, you are not deviating—you are simply mutilating the

work. Then if there is any case in which these powers ought to be kept within their proper bounds and to their proper purpose, it is where the work to which they are made applicable is a work which the promoters are required, and not merely authorized or permitted, to execute. It is impossible to suppose that by conferring upon the commissioners ordinary powers of deviation Parliament meant to confer upon them authority to reduce the mill-owners' compensation to any extent they might think proper.

I now come to the special matter in sect. 13. That is the foundation upon which the Court of Appeal have based their judgment, and it is therefore necessary to examine it closely.

The section says that the commissioners may deviate ". . . from the levels shewn on the deposited sections . . . in the case of reservoir No. 9 to any extent of lesser height, which will enable the commissioners to give a sufficient supply of water for compensation purposes in terms of this Act." That is the only provision in the section which is not in common form. Now the first observation that suggests itself is that the Act is there speaking of reservoir No. 9, as described in the Act and as delineated on the deposited plans. It is speaking of the reservoir to be formed by the proposed embankment across the River Dodder, in the situation where the Act and the plans place it. Then comes the question, Who is to determine the extent of the authorized deviation, or, what is the same thing, the proper height of the embankment? It is not left to be settled by agreement or arbitration. The mill-owners have no voice in the matter. There is no authority appointed to decide the question. It must remain to be determined by the event. In the meantime the persons who have to do the work, acting in good faith and keeping within the limits of their powers, must, I think, be the sole judges of how the work is to be done. Assuming good faith on the part of the commissioners, I do not think that the mill-owners would have had any ground of complaint or any right to interfere however much the embankment might have been lowered if it had been kept on its own proper site. The whole responsibility is cast upon the commissioners; the risk is theirs. Parliament has provided them with a basin which only

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wants one end closed up to become a reservoir sufficient, or more than sufficient, for all that can be required. If they please they may close the end up to the full height shewn on the deposited sections. Then they will have done all that can be done; they will be free from blame though the reservoir should turn out to be too small. Or, if they choose, they may stop at any lesser height they judge sufficient. But then they must be prepared to take the consequences if their judgment is in fault. And they must remember what the consequences are. Sect. 31 enacts that, "in case of any neglect on the part of the commissioners .... in consequence of which the quantity of water flowing from the said reservoir shall be less than the quantity prescribed," the mill-owners shall be entitled to compensation at the rate of £100 for every day during which the deficiency continues. Parliament has placed ample means at the disposal of the commissioners. If they, for purposes of their own, neglect to avail themselves of those means, and if the supply of water runs short by reason of that neglect, the stipulated compensation will become payable. That is one of the consequences. And there is another, and perhaps a more serious one. When the reservoir has once proved insufficient, if they mean to comply with the requirements of the Act, they must raise the embankment.

I fail to see any "extraordinary divergence," any "sweeping differences," between the statutory specification of reservoir No. 9 and the provisions of sect. 13. The special power of vertical deviation is really a very small modification after all. It was a reasonable concession to the commissioners if they desired it. With the safeguards accompanying it the exercise of such a power could make little or no difference to the mill-owners. But whether it be a large matter or not, your Lordships will bear in mind that the power has not been exercised. In constructing reservoir No. 9, or rather that section of it which has been constructed, the commissioners have not deviated in the least from the levels shewn on the deposited sections. I must say I have great difficulty in seeing how a conditional permission attached only to a special power which has not been exercised can affect the construction of another and a different power to which no

such permission is attached. Parliament has authorized the commissioners to do a particular thing in a particular way; they have done something else which is not authorized, and they justify their action on the ground that it comes to much the same thing in the end.

The contention on the part of the commissioners is that the site of the embankment, as constructed, is free from objection, because it is within the limits of deviation, and that the size of the reservoir is sufficient because a reservoir of no greater capacity placed at the lower end of what may be called "the parliamentary basin" would have been in compliance with the requirements of the Act. But is there not a difficulty to begin with? Under what authority, I ask, has this reservoir been constructed? It is certainly not in conformity with the statutory specification of reservoir No. 9. It has not been constructed under the power of vertical deviation. The commissioners have not availed themselves of that power at all. It is not justified by the power of lateral deviation. The power of lateral deviation cannot of itself authorize the commissioners to give the mill-owners something materially different from the provision made for them in the Act—a mere slice and section of the prescribed work instead of the work itself. The answer put forward on the part of the commissioners, as I understand it, is this: If the reservoir is sufficient it cannot matter to anybody whether it is placed at the top or at the bottom of the parliamentary basin. That might have been a good answer if Parliament had provided any means for determining the sufficiency of the reservoir once and for all. But that is not, I think, the scheme of the Act. The intention of the Act, in my opinion, was that if the commissioners availed themselves of the special power of vertical deviation the question of the sufficiency of the reservoir should remain in abeyance so long as the commissioners continued to fulfil their statutory obligations; but that if at any future time, however distant, the reservoir did not enable the commissioners to give a sufficient supply of water for compensation purposes, the embankment should be raised and the reservoir enlarged. So far as the security of the mill-owners is concerned there is a great difference between a reservoir which admits of extension and which has its

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sufficiency guaranteed by a substantial penalty, and a reservoir of the very same size, but incapable of enlargement, and without any guarantee of sufficiency.

As I have already intimated, I think that the Court had no jurisdiction to determine the question of the sufficiency of the reservoir as constructed, or the sufficiency of a reservoir formed by a lower embankment on the original site. In my judgment both parties have embarked on a fruitless inquiry. Under no circumstances, as it seems to me, could a question as to the size of the reservoir arise for the determination of the Court, unless it were alleged that the work had been done in an illusory manner. But, as our attention has been called to the evidence, I must say that I am not convinced of the sufficiency of the present reservoir. One of the learned judges of the Court of Appeal observes that the best evidence of its sufficiency is to be found in the inability of the mill-owners to prove that their apprehensions were realized during the exceptionally dry seasons enjoyed since the completion of the works. But then it seems that the only exceptionally dry season of late years occurred before the works were completed. Much of the argument turned upon the assumption that the mill-owners had a right to be served out of reservoir No. 1 in priority to the inhabitants of the township. I quite agree that the commissioners may use the surplus water and not merely the overflow of reservoir No. 1 to supplement the contents of reservoir No. 9. That, I think, is plain from sect. 41, which speaks of the compensation water as being discharged out of both reservoirs. But I do not think that the claims of the mill-owners are paramount to the claims of the township. I cannot suppose that Parliament could ever have intended that the inhabitants of a large and populous township, for whose benefit these waterworks were designed, should suffer from lack of water, with all the inconveniences and all the danger to public health attending a water famine, in order that some mills on the Dodder might be kept going a little longer. I find nothing in the Act to support that view. Nor can it, I think, be maintained on the ground of the mill-owners' original rights. The commissioners purchased the rights of the mill-owners in so much of the flow of the Dodder as was composed of water fit for

domestic purposes. The mill-owners may exact the consideration for the purchase to the last farthing; but they cannot at the same time be entitled to their original rights.

It is not, however, necessary to pursue this topic further. Though I do not think the sufficiency of the present reservoir has been established, I think it is extremely likely that it may never prove to be insufficient. But the mill-owners are not bound to be satisfied with probabilities. As I understand the Act, the commissioners were required to provide for the protection of the mill-owners one of three things: either (1.) a reservoir constructed according to the specification contained in the Act, or (2.) a reservoir not materially differing from it in capacity, constructed under the power of lateral deviation, or (3.) a reservoir formed by a lower embankment on the original site, but sufficient in their judgment, and moreover capable of being enlarged to the full extent of the parliamentary basin and always maintained under the pressure of a continuing liability in regard to its sufficiency. The reservoir which has been constructed does not satisfy the conditions of any one of these three plans. And therefore I am compelled to say that, in my opinion, the commissioners have failed to comply with the requirements of the Act as regards reservoir No. 9.

As regards conduit No. 10, it seems to me that there has also been a miscarriage on the part of the commissioners. The directions contained in the Act are explicit. The commissioners have chosen to disregard them. They have not continued the conduit past both reservoirs according to the plain meaning of the enactment. The conduit as constructed is not capable of receiving the waters of the streams to the west of reservoir No. 9, which it was, I think, clearly intended to catch. It does not form a junction with the River Dodder at the point specified in the Act. I do not think that these alterations are so slight or so trivial as to be beneath the notice of the Court. That being so, for my part I must decline to consider whether the contrivances of the commissioners' engineer may or may not answer the same purpose as the works prescribed by the Act. Promoters of public undertakings who buy off opposition by professing their readiness to submit to terms which they introduce into their

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Act, must understand that these parliamentary engagements are not things to be trifled with, and that if they choose to make them and to break them the Court may hold them to the letter of the enactment.

In the result, therefore, I am of opinion that the appeal must be allowed, and the order of the Master of the Rolls restored, omitting the earlier part of the injunction, which in its effect was mandatory, and could only be complied with by removing the works which are declared to be unauthorized and constructing works in accordance with the Act. The respondents must, I think, pay the costs of the appeal, and all the costs in the Courts below.

Of course, it will be proper to suspend the injunction for a reasonable time, so as to give the commissioners an opportunity of coming to terms with the mill-owners, or applying to Parliament if they should be so advised. I would suggest, therefore, that the injunction should not come into operation till the 1st of August 1893, and that the commissioners should be at liberty to apply to the Court or judge in case further time is required.

LORD MORRIS:—

My Lords, after the full and elaborate judgments of the Master of the Rolls, before whom this case was originally heard, and of the judges in the Court of Appeal, it is unnecessary to repeat the facts of the case.

In the argument before your Lordships it has been conceded on both sides that the question turns upon the true construction of the local Act. I did not collect that the respondents resisted the proposition that if the provisions of the Act were violated in the construction of the works complained of, the appellants, as persons interested, were entitled to obtain redress for the violation. The first and far more important question is, Was work No. 9, as constructed, authorized by the Act? The next, and comparatively of far less importance, is whether work No. 10 was executed as authorized by the Act.

The considerations applicable to the two works are essentially different. The reasons, shortly stated, which lead me to the conclusion that the appellants have entirely failed in their case as to

work No. 9, are these. By the statement of claim the appellants allege at par. 24 that the work No. 9 was not constructed in a place authorized by the Act. Next they allege that the reservoirs which the respondents constructed are not of sufficient capacity to secure in dry seasons a continuous supply of compensation water for the use of the appellants, as provided by the local Act. These two causes of complaint are essentially different. The first depends on the authority of the respondents to construct the work No. 9 where they did. The other question is one of fact. If the first question is decided in favour of the appellants, it becomes unnecessary to enter upon the second. But, if the first question is decided against the appellants, they should then prove that work No. 9, though authorized to be constructed where it has been, did not supply, as constructed, sufficient compensation water.

Dealing with the second question first, and on the assumption that work No. 9 was authorized to be constructed where it has been, the onus of proof was upon the appellants, as plaintiffs in the suit, to establish their allegation that there was an insufficient supply of compensation water. The evidence satisfies me, not alone that the appellants did not establish their contention, but that the respondents established the negative of it. The Master of the Rolls, though deciding in favour of the appellants on the question of the right of the respondents under the statute to construct work No. 9 where it has been constructed, and that in point of position and site work No. 9 has been illegally erected, states he would have great difficulty in deciding on the evidence before him that the supply of water was not adequate. The Lord Chancellor says: "I concur with the Master of the Rolls that there is no evidence that the commissioners have failed to give an adequate supply. I think that the great preponderance of evidence is persuasive to shew that the supply is sufficient and will not fail." The Lord Chief Baron, in a judgment which is a repertory of every fact and argument of importance, says that he arrives at the conclusion that the reservoir constructed is of sufficient capacity. FitzGibbon L.J. says: "The plaintiffs have wholly failed to give any evidence from experience that the reservoir as constructed is insufficient" either

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to give or even to secure a supply for compensation purposes in the terms of the Act.

I agree, however, that the appellants, though having no cause of complaint on merits, are entitled to contend that the respondents had no authority to depart substantially from the plans and site of work No. 9, as provided by the plans and by sect. 9 of the local Act. The respondents admittedly did largely depart from the position of, and the capacity of, the reservoir No. 9, as shewn on the plans and described in sect. 9 of the Act. In my opinion they were entitled to do so.

The case on this vital point is reduced to a narrow question: Did sect. 13 of the local Act authorize the change that was made? The appellants strongly relied on the plans as deposited, and urged that additional weight was given to their contention by the description in sub-sect. 9 of sect. 9 of work No. 9. That sub-section describes very fully in words what is represented in the plans. But it appears to me to add nothing in weight to the reference to the plans made at the commencement of the section. A detailed description in sub-sect. 9 of the plan of work No. 9 cannot control the right to deviate from the plan, if such right is given. That a large deviation from the plan was contemplated appears to me to be very clear. The plans deposited described a work essentially different from what was afterwards agreed to. The plans deposited intercepted all the water of the river, and the appellants were to get a regulated supply, to be paid for. The Act, by sect. 24, gives them a fixed supply of compensation water. The work No. 9, from being a reservoir to store all the peaty water, became a reservoir to store the supply of compensation water. This important change, as well as other lesser changes, could not appear on the plans, which were never altered after being deposited, and do not appear in sub-sect. 9, which describes in words what was painted on the plans.

Again, it appears to me useful to bear in mind that work No. 9 was nothing more than an embankment across the bed of the river impounding the water so as to afford a supply for the appellants' mills. This consideration dissipates very inapplicable analogies suggested, of the deviation of a railway or the change of site of a railway station. The railway may be deviated to either

side of the line laid down. I fail to see how an embankment, constructed sideways to the line of the bed of the river, could ever form an impounding of its waters. Consequently, any deviation intended to be authorized should be a deviation up or down the river.

Sect. 9 enacts that the commissioners may make in the lines and according to the levels shewn on the plans the works after described. Sub-sect. 9 describes work No. 9 as an impounding reservoir on the bed of the river, and gives its site with detailed termini corresponding with the plans deposited, thus giving the character of the work, its lines, and levels. But substantial and large changes in the works from the original plans were to be authorized. Does sect. 13 authorize the alterations made in work No. 9? is the question. In my opinion it does. In words it authorizes "a deviation from the lines of the work to any extent, not exceeding the limits of lateral deviation shewn on the deposited plans, and from the levels in the case of work No. 9, to any extent of lesser height which will enable the commissioners to give a sufficient supply of water for compensation purposes in terms of the Act." That, in my opinion, allows the embankment, which constitutes the impounding reservoir No. 9, to be moved or shifted up or down the river, provided that in its altered position it be within the area of ground marked out in the plans by limits of deviation, and described in the section as limits of lateral deviation, and provided that the reservoir so constructed should be adequate to give the supply of compensation water contracted for. The concluding part of the section, which enacts that "the commissioners shall not, in the exercise of the power of lateral deviation given, construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shewn on the plans with reference to the corresponding embankment or wall, and six feet in addition," implies that a reservoir has to be constructed other than that described in the plans.

In my opinion, sect. 13 authorizes the movement of the lines of the works, including No. 9, up or down the river to any extent within the area shewn by lines on the deposited plans and from the levels of the deposited plans, provided such deviation or

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alteration or movement up or down the river of the embankment enables the commissioners to give the compensation supply of water agreed to. Such appears to me to be the ordinary signification of the words of sect. 13; and if so, why not give them that meaning when the appellants can have no concern, much less cause of complaint, where the reservoir is placed if they get their sufficient supply? I am satisfied on the evidence that reservoir No. 9 is adequate for that purpose.

But if it is necessary to decide the question, I am also of opinion that the appellants, the mill-owners, are entitled, in preference to the water-drinkers, to a supply from reservoir No. 1, if it ever became necessary to resort to it in order to make up the stipulated supply. The appellants had their right to a supply of water prior to the statute. The statute it is which gives any power to the commissioners to supply the township with drinking water. The right of the appellants to the stipulated quantity in lieu of their previous right, must be paramount to the right of the township to get drinking water from reservoir No. 1, and is a first charge on it.

As regards conduit No. 10, in my opinion, the commissioners did not construct the work in the manner and according to the provisions set out in the Act in respect to it. As pointed out by your Lordships, and as pointed out in the judgment of the Lord Chief Baron, it materially departs as constructed from what was authorized and enacted in the interest of the appellants. In my opinion, the appellants are consequently entitled, whether suffering damage or not, to compel the work No. 10 to be constructed in the manner authorized.

In the result I cannot concur in the judgment moved.

LORD HANNEN:—

My Lords, the question in this case is whether the Rathmines and Rathgar Improvement Commissioners have executed certain works in a manner not authorized by the Act from which they derive their powers. The Act recites that "the existing waterworks of the commissioners are no longer adequate for all the purposes of the township, and it is expedient that the commissioners should be authorized to obtain an improved and

independent supply in manner by the Act authorized"; that "various mills and factories are situated upon or near the River Dodder, and the said mills and factories are in part worked by the waters of the River Dodder, and the supply of water to such mills and factories may be affected by or in consequence of the works authorized by the Act; and it is expedient that compensation should be made to the several owners, lessees, and occupiers of such mills and factories for any loss or diminution of or interference with said supply of water as aforesaid." And after further reciting that "plans and sections describing the lines, situation, and levels of the works authorized by the Act have been deposited," the Act proceeds to authorize certain works. The general scheme of these works, as depicted on the plans and described in the Act, was to collect into a reservoir, No. 1, the clear water flowing on the lower parts of the valley of the Dodder, for the supply of the township, and to catch the peaty waters of the upper parts of the valley, and by means of a conduit, No. 10, to restore to the natural bed of the river the larger part of the water so caught, and to collect the residue in a reservoir, No. 9, below the clear-water reservoir, No. 1, and in this lower reservoir (whether with or without the assistance of the clear-water reservoir is a subsidiary question in the cause) to store up sufficient water to supply a prescribed quantity of water per week for the use of the mill-owners and others, as compensation to them for the waters diverted.

The first and principal question is whether the legislature has absolutely fixed the point at which the embankment forming the lower end of the reservoir No. 9 should be placed, or whether the commissioners have authority, under the powers of deviation given them, to alter the situation of the lower end of reservoir No. 9, as shewn on the plans and described in the Act, always supposing that they store up sufficient water for the prescribed supply of the mills. It is unnecessary to repeat the language of the section of the Act describing the work No. 9, which is in conformity with the plans. Taken by itself, this section fixes, within such limits as may be indicated by the words "or thereabouts," the place at which the embankment forming reservoir No. 9 is to be constructed across the

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valley of the Dodder. But the question for determination is whether the commissioners, under sect. 13 of this Act, have the power to change, as they have done, the place at which the embankment shall be built to a point higher up the valley than 900 yards, "or thereabouts," from Fort Bridge. Almost every sentence of the 13th section requires consideration. It commences thus: "In the construction of the works by this Act authorized, the commissioners may, *subject to the provisions of this Act, deviate* from the *lines of such works* to any extent not exceeding the limits of *lateral* deviation shewn on the deposited plans." This power being subject to the provisions of the Act, if it can be shewn that by any provision of the Act the site of the embankment of No. 9 is definitively fixed, then sect. 13 would give no authority to change that site; but I cannot find any such provision. Primâ facie, all the works are fixed by the 9th section of the Act and the plans; and if the works are to be taken as definitively fixed, as shewn on the plans and described in the Act, it would leave no operation for the power of deviation given by the 13th section.

The 9th section gives the commissioners power to make the works there described, "subject to the provisions of this Act," in the same way as the power of deviation given by s. 13 is "subject to the provisions of this Act," so that neither section can be construed by itself. These words, in short, do no more than emphasize what would have been the proper rule of construction without them—namely, that in ascertaining the true meaning of any section the other provisions of the Act must be taken into consideration.

Now the 9th section, following or confirming the plans and sections, assigns a place for each of the works it authorizes, and it describes each work authorized with the same minuteness as reservoir No. 9 is described. There is only one of them which calls for particular comment. The work No. 14 is a service reservoir described as "in a field bounded on the east by the main road from Rathfarnham to Killakee, and on the south by the road leading from the said main road to Woodbine Lodge, the centre of the said intended reservoir being distant 110 yards or thereabouts, measured in a north-westerly direction from the

junction of the road leading to Woodbine Lodge with the public road from Rathfarnham to Killakee." I think that it is admitted that the power of deviation given by sect. 13 applies to the service reservoir; certainly I can see no plausible ground for suggesting that it does not; yet the centre of that reservoir is as much fixed as the line of the embankment No. 9, and the language of sect. 13 is equally applicable to any embankment of any reservoir as to the service reservoir. It appears to me, therefore, that as the service reservoir might have had the lines of its embankments deviated in such a manner as to make its centre take a different position to that described and indicated on the plan, so in the same way the line of the embankment of No. 9 may be deviated. As I have already pointed out, any other construction would make the descriptions of the several works given in the 9th section absolute, and would leave nothing for the power of deviation given by the 13th section to operate on.

The next observation to be made on the 13th section is, that the power to deviate (the meaning of this word will be considered presently) is to deviate from the *lines* of the works—that is, not the line of the works, which might be construed to mean the general line or direction of the works up and down the river, but each and every line of the works, not exceeding the limits of lateral deviation shewn on the plans.

There is no dispute as to the limits of lateral deviation; they are shewn on the plans, and are there called simply "limit of deviation." Within that limit the commissioners have power to do whatever is comprehended under the word "deviate."

Thus far, sect. 13 has dealt only with the right to deviate from the lines of the works with regard to *situation*. It next proceeds to regulate the right to deviate from the *levels* shewn on the deposited sections. The commissioners are empowered to deviate from those levels, as to reservoir No. 1, to any extent not exceeding six feet; "and in the case of reservoir No. 9, to any extent of lesser height" (i.e., than the level given on the section) "which will enable the commissioners to give a sufficient supply of water for compensation purposes in terms of this Act."

The supply of water for compensation purposes is prescribed

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by sect. 24, which requires the commissioners to cause to flow into the Dodder, for the use of the mill-owners, in the course of every week not less than 14,700,000 gallons.

And by sect. 41 it is enacted that, "so long as the commissioners shall continue to discharge from and out of their said *reservoirs Nos.* 1 *and* 9 and works the due quantity of compensation water in manner aforesaid, the same shall be accepted and taken by all parties interested as full compensation for all water which the commissioners can collect or divert from the lands draining to the said reservoirs."

The commissioners might, therefore, reduce the height of the embankment of reservoir No. 9 to any extent consistent with their remaining able to supply out of the two reservoirs the prescribed quantity of compensation water. It has, indeed, been contended that the full supply of compensation water must be drawn exclusively from reservoir No. 9, or rather that that reservoir (No. 9) should, by itself, be sufficient to afford the full supply; but I fail to see any argument by which this contention can be supported consistently with the 41st section. That section distinctly states that, so long as the due quantity of compensation water is supplied out of reservoir No. 1, as well as No. 9, it shall be accepted as full compensation, thus implying that such an application of the water of No. 1 would be lawful. But it is not necessary now to pursue this inquiry further; it is enough for the present purpose to point out that the 13th section authorizes the commissioners to lower the embankment of No. 9, and so entirely to alter the dimensions of that reservoir. A lower level of water would shorten the reservoir at the southern or upper end, and so make it cease to be of the length of 1700 yards, as depicted on the plans and described in the Act. It would also alter all the lines and the whole contour of the margin of the reservoir. Is there then anything which exempts the line of the embankment from the power of deviation which the commissioners certainly have with regard to the other lines of reservoir No. 9? One of your Lordships attaches importance to the fact that the whole reservoir No. 9, and not merely this embankment, is the "work" authorized by the Act; but the power to deviate is to deviate from the lines of such works, and it cannot be denied

that the line of the embankment is one of the lines of the work No. 9, and the power to deviate extends to *all* the lines of the works. What, then, is the meaning of the word "deviate" as applied to the line of the embankment? Only two interpretations of this word in this connection can be suggested: the one is by extending the line of the embankment at one or both ends; the other is by changing its position up or down the valley of the Dodder. With regard to the first, I think that such an extension is not within the natural meaning of the word "deviate," which signifies a departure from the line indicated, not its prolongation. But what is of more importance, as it appears to me, is that the Act shews that this could not be the meaning of the word "deviation" with regard to the line of any embankment, because the Act does not authorize any raising of the level of the embankment to be constructed at the place indicated on the plans "or thereabouts." The embankment as planned and described stretches across the whole valley; if it did not it would fail to fulfil its office of penning back the water so as to form the reservoir; it could not therefore be extended without raising it, which is not authorized at the place indicated on the plans; while, on the other hand, the concluding sentence of the 13th section does provide for and authorize the raising, to the extent of six additional feet above the general surface of the ground, of any embankment of any reservoir which may be constructed in some other place under the power of deviation. The sentence referred to is as follows: "But the commissioners shall not in the exercise of the power of lateral deviation construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shewn on the plans with reference to the corresponding embankment or wall, and six feet in addition." The "lateral deviation" here mentioned must be a departure from the line of the embankment shewn on the plans towards one side or other up or down the valley, since it implies a removal to some place where six feet may be added, while only a diminution of height is authorized with regard to the embankment at the place shewn on the plans; and the "corresponding embankment" must mean the embankment shewn on the plans which the commissioners

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could move in the exercise of their power of lateral deviation. It is said that a clause to the effect of the last sentence of sect. 13 is usually introduced into Waterworks Acts to guard against the risk of pounding up too large quantities of water; but its construction cannot be different because the same or similar words are used in other Acts than the one under consideration. The legislature has applied the clause to this particular case, and must be deemed to have framed it with reference to the special facts before it. In contemplation of these facts, the concluding sentence of sect. 13 recognises the right of the commissioners to exercise the power of lateral deviation (the meaning of which I have already examined) with regard to *any* embankment of *any* reservoir shewn on the plans. I am unable to see how it is possible to exclude the embankment forming the reservoir No. 9 from the generality of this language.

The Master of the Rolls places reliance on the 11th clause of the Waterworks Clauses Act 1847 (incorporated with this Act), which prohibits a greater lateral deviation than ten yards where no number of yards is prescribed in the special Act. But the general enactments of the Waterworks Clauses Act are subject to the provisions of the special Act, and by this special Act power is given to deviate from the lines of the works "to any extent" not exceeding the limits of lateral deviation shewn on the plans. The argument is therefore brought back to the question, What are the powers of deviation given by this special Act, with which I have already dealt?

For these reasons I arrive at the conclusion that the commissioners were authorized by the Act of Parliament to alter the lines, dimensions, and capacity of reservoir No. 9, and that they might do so either by lowering the level of the embankment, leaving it at the place indicated on the plans, or by deviating the line of the embankment laterally, which I understand to mean towards either side of that line. This power, however, is always subject to the obligation expressly imposed on the commissioners by the 24th sect.: "to cause to flow into the River Dodder for the use of the upper mill-owners, in the course of every week, a quantity of water not being less than 14,700,000 gallons."

The 13th, 31st, and 41st sections shew, that the supply of this

quantity was intended to be secured by means of the water flowing out of reservoir No. 9.

It remains, therefore, to be considered, whether the commissioners are enabled (to use the words of sect. 41) to continue "to discharge from and out of their reservoirs Nos. 1 and 9, and works" the prescribed quantity. I will first deal with the quantity capable of being stored in reservoir No. 9. It is admittedly of about one-third the maximum capacity of the reservoir as shewn on the plans. The Master of the Rolls says that in his opinion it is very clear that a lesser height of the embankment would have sufficed, and that no one contemplated this maximum being needed, and he adds: "If the case turned on the first of those questions, that is, if the embankment had been made where the plans shew it, I confess I should have great difficulty in deciding on the evidence before me that it was inadequate. Up to the present there has been no deficiency of compensation water in any way traceable to the size of the reservoir." Thus the Master of the Rolls on this point does not differ in opinion from the Court of Appeal, that reservoir No. 9 is by itself sufficient to enable the commissioners to supply the prescribed compensation water. The actual quantity which the reservoir will hold is 160,000,000 gallons; the quantity to be supplied is 14,700,000 gallons per week. The reservoir would, therefore, suffice for nearly eleven weeks. The evidence satisfies me that, so far as human foresight based on past experience can predict the future, this reservoir No. 9 will provide the commissioners with the means of fulfilling their obligations to the mill-owners. But if, contrary to what can reasonably be expected, No. 9 as constructed should ever fail, it seems to me clear that the commissioners would be entitled and bound to supplement it by the water of No. 1. Sect. 41 says, that "so long as the commissioners shall continue to discharge from and out of their said reservoirs Nos. 1 and 9 and works" the due quantity of compensation water, the same shall be accepted in full compensation for the water deviated. So long, therefore, as the water is supplied out of these two reservoirs conjointly, the petitioners have no ground of complaint.

The suggestion has been made that the words "from and out

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of their said reservoirs Nos. 1 and 9" would be satisfied by the application of whatever surplus water might descend from No. 1 when full to No. 9. But this interpretation attributes a futile meaning to the language used. It is as though the clause had said, "So long as they shall discharge out of reservoir No. 9, and the water that flows into it, or the rain that falls on it." The excess of reservoir No. 1 must flow into No. 9, and therefore need not have been referred to. The section as framed seems to me to point to the direct use by appropriate works of the water of No. 1 if needed for the supply of the compensation water. Out of the two reservoirs the supply of water would be enormously in excess of anything the commissioners are called on to provide.

I see no reasonable ground to anticipate that any conflict between the interests of the mill-owners and those of the township would ever arise; but if it should, I think that the interests of the mill-owners must prevail. Upon this ground I can add nothing to the reasons so well expressed by the Chief Baron, and I adopt his language: "The obligation imposed by this section (24) is, in my opinion, paramount to any obligation or a right in them to send down the water to the township. The condition upon which the diversion is permitted is that the commissioners shall return into the River Dodder a specified quantity of the water diverted. This obligation necessarily must be performed out of the water which has been diverted. The schedule in no wise limits the subject-matter out of which this obligation is to be fulfilled to water flowing to any particular works; so that the obligation is out of *all* the water diverted to send down the specified quantity, and a breach of this obligation would, no doubt, be restrained by the injunction of this Court. The mill-owners claim not through the commissioners, but above them. The inhabitants of the township claim through them. Those inhabitants can take nothing that the commissioners cannot rightfully claim as against the mill-owners. What they can so claim is the surplus only of the water after performing their obligation to the mill-owners."

On these grounds I come to the conclusion that the commissioners have not exceeded their powers in the construction of reservoir No. 9, and that as constructed it will enable them to

fulfil their obligation to supply the prescribed quantities of the compensation water.

With regard to work No. 10, I think the commissioners have exceeded their powers. Work No. 10 is described as "a diversion of streams or watercourses commencing by a junction with the said River Dodder at a point" (above both the reservoirs), "*which conduit* shall be continued past both reservoirs, and terminate with the said River Dodder at a point" (below both reservoirs). The commissioners, instead of carrying this conduit as an open watercourse past both the reservoirs, have conveyed the water contained in it under reservoir No. 9 by means of a closed pipe lying along its bottom.

This conduit in its upper portion must, in order to fulfil its functions as a diversion of streams (of which there are many shewn in the plans), be an open watercourse. The conduit itself, not merely the water contained in it, is to be continued past the two reservoirs, and the 11th section shews that what was contemplated was an open watercourse, because that section excepts certain streams from the powers of the commissioners to appropriate water for the purposes of the Act. These excepted streams include some which would naturally flow into reservoir No. 9, and the 11th section says that these streams may be intercepted into No. 10. This, of course, becomes impossible if No. 10, instead of running along the side of the valley, is carried under the reservoir. This seems to shew that the legislature contemplated and authorized only such a conduit as would admit of its intercepting the streams referred to.

But, further, I think that the meaning of the 11th section is that these streams are to be intercepted by conduit No. 10 in order that they may be conveyed into the River Dodder below the embankment of No. 9. The word "may" in the 11th section does not give the commissioners an option; it merely indicates the purpose for which the conduit to be extended is designed, namely, that the streams may be thereby intercepted. By the course which the commissioners have adopted they have deprived the mill-owners of these streams, and used them to make up the compensation water they were bound to supply in addition to the water to be conveyed by conduit No. 10.

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It appears to me, however, that the water thus appropriated by the commissioners is of an insignificant amount, and that it could be restored to the Dodder in the manner suggested by the Court below without disturbing the existing work, which does not injuriously affect the mill-owners otherwise than by the abstraction of the water flowing from a few acres of land.

The plaintiffs claim an injunction in such a form as would compel the commissioners to remove the pipe from the reservoir, and to convey all the water which No. 10 is intended to collect in an open course along the bank above the reservoir. For the reasons given by the Chief Baron, I think that no injunction which would have this effect should be granted, and that, as the commissioners have given the undertakings required of them in the Court below, this appeal should be dismissed.

Order of the Court of Appeal reversed; Order of the Master of the Rolls restored, subject to the following modification, viz., that so much of the Order as awards a perpetual injunction to restrain the respondents their officers &c. from continuing the reservoir No. 9 *and the diversion of streams or water-course work No.* 10 *in the state and condition in which the same now are or in any other state and condition than shall be in accordance with the terms and provisions of the Rathmines and Rathgar Water Act* 1880, *shall be omitted therefrom, and that the injunction granted by the Order as so modified shall not come into operation till the* 1*st of August* 1893, *the respondents to be at liberty to apply to the Court or a Judge in case further time is required by them; the respondents to pay the costs here and below; Cause remitted to the Chancery Division, Ireland.*

Lords' Journals 23rd May 1892.

Solicitors for appellants: *Hopgood & Dowson, for Maunsell & Son, Dublin.*

Solicitors for respondents: *Holmes, Greig, & Greig, for D. & T. FitzGerald, Dublin.*

[HOUSE OF LORDS.]

HENRY WILLIAM HATTON . . . . . APPELLANT; H. L. (I.) 1892 June 27.

AND

HUGH HARRIS . . . . . RESPONDENT.

Bond and Interest—Judgment on Bond—Penal Sum—Interest beyond Penal Sum—Decree charging Judgment on Land "with Interest until paid"—Sale of Land under Incumbered Estates Court Ireland—Priorities of Incumbrancers—Clerical Mistake in Judgment—Accidental Slip—Correction of Error in Judgment—Judicature Act (Ireland) (40 & 41 *Vict. c.* 57) *s.* 25—*Rules of the Supreme Court (Ireland)* 1891, *Order* XXVIII. *r.* 11.

In 1842 a judgment was obtained by B. against a debtor upon a bond for £1000 conditioned for payment of £500 and interest. A bill in equity having been filed by other judgment creditors a decree was made in 1853 confirming the Master's report that there was then due to B. under the judgment the sum of £500 with the interest then accrued, and declaring that that sum and the sums found by the Master's report to be due to other creditors with interest "until paid" were well charged upon the debtor's lands. Part of the lands were sold in 1856 under an order of the Incumbered Estates Court (Ireland) but there were not sufficient funds to pay B. In 1891 moneys derived from the sale of lands being found in Court to the credit of the cause, B.'s representative applied to have the principal and interest then amounting to more than £1000 paid out to him. The next incumbrancer objected that no more ought to be paid to the applicant than the penal sum £1000:—

Held, that B.'s charge upon the lands ought not to have been extended beyond the penalty to the prejudice of a subsequent incumbrancer; that there was obviously in the decree of 1853 an error arising from an accidental omission, and that under Order XXVIII. r. 11 of the Rules of the Supreme Court (Ireland) 1891 the decree should on a proper application be corrected by inserting the words "the principal sum and interest not to exceed the amount of the penalty on the bond."

The decision of the Irish Court of Appeal (27 L. R. Ir. 512) affirmed.

APPEAL from an order of the Irish Court of Appeal reported as *In re Knipe's Estate* (1).

The circumstances out of which the appeal arose were as follows. On the 7th of June 1842 G. M. Benson the testatrix of the appellant obtained a judgment against a person named Knipe upon a bond in the penal sum of £1000 and costs,

(1) 27 L. R. Ir. 512.

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the bond being a bond to secure the principal sum of £500 and 6 per cent. interest. A Bill was filed on the then Equity side of the Court of Exchequer by Hill and Hall, who were judgment creditors of Knipe, and in January 1852 the usual decretal order was made for the Master to take an account. The Master accordingly made a report, and in that report he stated that he had "in the first schedule set out an account of all charges and judgments affecting the said lands, tenements, rents and hereditaments with their respective priorities, with the sums due upon each respectively." In that account the seventh incumbrancer was stated to be "Georgina Mary Benson, on foot of judgment recovered by her against said Defendant George M. Knipe in the Court of Common Pleas in Trinity Term 1842, £500. Interest thereon from the 7th day of December 1847 to the 1st of April 1853, £159 11*s.* 1*d.*;" and an amount of taxed costs not material to the present question. In that report he gave, in the third schedule, the evidence upon which his report was founded. That evidence shewed that as regarded Georgina Mary Benson his report was founded upon an "Attested copy Judgment obtained by Georgina Mary Benson against said George Marshall Knipe in or as of Trinity Term 1842 in the Court of Common Pleas for the penal sum of £1000." It therefore appeared upon the face of those proceedings that the right of Georgina Mary Benson to claim against the land was in respect of a judgment obtained for the penal sum of £1000, for the purpose of securing £500 with 6 per cent. interest.

Upon that report the Lord Chancellor, before whom the suit was, made a decree dated the 9th of June 1853 declaring "that the several sums in said report found to be due to the plaintiffs and to the defendants, Nathaniel Callwell, Simon Foot, and Lundy Edward Foot, and to the several other reported creditors, with interest at the rate in said report mentioned upon the principal monies reported due to the said plaintiffs and defendants and creditors respectively from the 1st day of April 1853 until paid, are well charged upon the lands and premises in said report in that behalf respectively mentioned, and are incumbrances affecting the said lands and premises respectively."

In 1856 portions of the lands were sold under an order of the

Incumbered Estates Court Ireland, and the incumbrancers prior to G. M. Benson were paid off. Nothing more was done in the matter for a great many years. There was, in fact, as regards the incumbrancer represented by the appellant, no money to distribute. But in the year 1890 the appellant discovered that there were certain sums standing to the credit of the cause of *Hill* v. *Knipe*, and on his application the Master of the Rolls ordered that those sums so standing to the credit of the cause of *Hill* v. *Knipe* should be transferred to the Land Judges' Court, Chancery Division. An application was made to that Court in 1891 by the appellant, as the personal representative of Georgina Mary Benson, to have paid out to him the sum of £1775 15*s.* 11*d.*, which was the amount of £500 with interest at 6 per cent. calculated down to that time. At this time the appellant represented the first incumbrancer, the prior incumbrances having been discharged; so that the matter as regards the sum then in court was a question between the representative of Georgina Mary Benson, who was then the first incumbrancer, and Harris, the next incumbrancer. Gibson J. (sitting for the Land Judge of the Chancery Division), notwithstanding the opposition of the respondent Harris, ordered that the appellant be entitled to interest on his charge of £500 at 6 per cent. until paid, notwithstanding the sum of £500 and interest exceeded the penal sum of £1000 mentioned in the judgment of the 7th of June 1842. Harris insisted that all that ought to be paid out to the appellant was the sum of £1000, no more than that sum being in any way chargeable upon the lands, or recoverable by him as a charge at all events upon the lands, the sum of money in Court being a part of the proceeds of the sale of some of the lands.

Gibson J. made his order upon the authority of the case of *Wilson* v. *Poe* (1), which was decided by Sir Edward Sugden when Lord Chancellor of Ireland. When the matter came before the Court of Appeal (O'Brien C.J., FitzGibbon and Barry L.JJ.) they reversed the decision of Gibson J. and made an order declaring that the appellant was entitled to interest upon the sum of £500 at the rate of 6 per cent., the said sum and interest

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

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not to exceed in the aggregate the penal sum of £1000 mentioned in the judgment of the 7th of June 1842.

June 20, 21, 23, 27. *D. H. Madden* Q.C. (*Attorney-General for Ireland*) and *A. W. Samuels* (of the Irish Bar) (*J. Gordon McCullagh* with them) for the appellant:—

The question is whether the appellant is entitled to interest until the whole sum is paid, or whether the interest is to cease when the amount secured by the bond is reached. The sale here was under the Incumbered Estates Court Act, and the judgment was a charge on the land. Sir E. Sugden L.C. decided in 1845, that where a judgment was founded on a bond and the Court had made a decree making the sum a charge on the land, with interest until payment, the decree was conclusive, although the interest might exceed the amount of the penalty on the bond: *Wilson* v. *Poe* (1) In the absence of special circumstances, or a decree such as that in this case, no doubt the interest cannot exceed the penalty, but the proper course to have taken was to have appealed against the decree.

[LORD MACNAGHTEN referred to *Mellor* v. *Swire* (2).]

This decree was made in 1853 in the form decided to be good in *Wilson* v. *Poe* (1) in 1845, and it has been the practice of the Court ever since that decision. Interest beyond the penalty was allowed to a judgment creditor in *Cloughley* v. *Jameson* (3); and see *Gaunt* v. *Taylor* (4); *Godfrey* v. *Watson* (5); *Hamilton* v. *Houghton* (6). This House will always be reluctant to disturb old decisions which have been acted upon: *Davidson* v. *Sinclair* (7); *Hill* v. *East and West India Dock Company* (8). *Wilson* v. *Poe* (1) is not distinguishable: see the observations on that case in *Purcell* v. *Blennerhassett* (9). As to the jurisdiction of the Land Court, see *Montefiore* v. *Brown* (10).

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.
(2) 30 Ch. D. 239.
(3) 13 Ir. Eq. Rep. 471.
(4) 3 My. & K. 302.
(5) 3 Atk. 517.
(6) 2 Bli. O. S. 169.
(7) 3 App. Cas. 765.
(8) 9 App. Cas. 448, 457.
(9) 10 Ir. Eq. Rep. 470.
(10) 7 H. L. C. 242.

[LORD MACNAGHTEN:—Is there any case in which interest beyond the amount of the penalty has been given as against subsequent incumbrancers?]

A subsequent creditor should not be allowed to affect the rights of the prior creditor. The case cannot now be reheard: *In re St. Nazaire Company* (1). It is only a surmise that the decree was drawn up in that form by a clerical error; the presumption is the other way. The Court of Appeal seem to have acted upon *O'Connell* v. *M'Namara* (2) which was an earlier decision of Sir E. Sugden L.C.; but there the decree was erroneous on the face of it. Where lands are sold under an order of the Incumbered Estates Court, the proceedings are governed by 12 & 13 Vict. c. 77 ss. 41, 42. The powers of the Land Court were considered in *Re Lananze* (3) in 1859, where it was held that the judges of the Land Court were bound by a decree of the Court of Chancery.

[LORD MACNAGHTEN:—Was there not an error in the decree which might have been corrected?]

The judge of the Land Court had no power to treat the decree as erroneous or correct it: the appeal from the Land Court to the Court of Appeal is by statute, and that Court on appeal had no greater powers of correction than the Land Court had. A bill of review to correct an error must be brought within twenty years: Mitford's Pleadings 88, 204; *Lytton* v. *Lytton* (4); *Perry* v. *Phelips* (5); and the time for correction has long since elapsed. *Mellor* v. *Swire* (6) is distinguishable on the facts; there it appeared clearly that the Court had not intended to decide a certain question which the order as drawn up might be construed to decide. It ought not to be presumed that the Lord Chancellor made a mistake; there may have been "special circumstances" justifying interest beyond the penalty: *Clarke* v. *Seton* (7); *Grant* v. *Grant* (8).

(1) 12 Ch. D. 88.
(2) 3 D. & War. 411.
(3) 11 Ir. Ch. 19.
(4) 4 Bro. C. C. 441.
(5) 17 Ves. 173.
(6) 30 Ch. D. 239.
(7) 6 Ves. 411, 416.
(8) 3 Sim. 340.

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Crackanthorpe Q.C. and *Gaussen* (of the Irish Bar) for the respondent:—

This is a claim on a judgment which is made a charge on land by statute 3 & 4 Vict. c. 105 ss. 22, 26. But where there is a penal sum there can be no claim for interest beyond that sum: *Hughes* v. *Wynne* (1); therefore there was error on the face of the decree: *Elliot* v. *Tynte* (2). The appellant's argument assumes the existence of "special circumstances" of which there is no evidence, and which would in any case be of no force as against subsequent incumbrancers: *Hyde* v. *Hart* (in 1837) (3); *Garner* v. *Briggs* (4). *Wilson* v. *Poe* (5) was a totally different case, being only between debtor and creditor, and not between a prior and a subsequent creditor; but if it is in point it should be overruled. "Special circumstances" cannot be of any avail to charge land: see *Purcell* v. *Blennerhassett* (6). No title has accrued on the footing of this construction of the decree, and no injustice is done by the decision of the Court of Appeal. If necessary the error in the decree may be corrected. By virtue of the Act 21 & 22 Vict. c. 72 the Landed Estates Court succeeded to the powers of the Incumbered Estates Court, and by the Irish Judicature Act (40 & 41 Vict. c. 57) s. 7, the jurisdiction of the Landed Estates Court is transferred to the Land Judges' Court, Chancery Division of the High Court. Time is no bar to the correction of an accidental slip: *Brandon* v. *Brandon* (7). The error can be corrected under the Irish "Slip Order" Order XXVIII. r. 11, which is in substance identical with the Irish General Orders of 1843, Order 103, and with the present English rule. This is a case in which leave to appeal would have been given: *In re Manchester Economic Building Society* (8). The appeal might be adjourned in order that a formal application might be made to correct the error, but that would increase the costs.

(1) 1 My. & K. 20.
(2) Beat. 478.
(3) Coop. 193.
(4) 27 L. J. (Ch.) 483.
(5) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.
(6) 10 Ir. Eq. Rep. 470.
(7) 7 D. M. & G. 365.
(8) 24 Ch. D. 488.

D. H. Madden Q.C. was heard in reply.

Before the arguments concluded the learned counsel consented that the matter should be dealt with as if an application had been made in *Hill* v. *Knipe* to correct the decree of the 9th of June 1853, as appears by the terms of the order at the end of the present report.

Order XXVIII. r. 11 of the Rules of the Supreme Court (Ireland) 1891 is as follows :—

" Clerical mistakes in judgments, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without appeal."

LORD HERSCHELL (after stating the facts set out above, proceeded as follows) :—

My Lords, there can be no doubt that as regards the construction of the Lord Chancellor's decree in the present case, and as regards the rights of the parties, so long as that decree stands in the form it does the case of *Wilson* v. *Poe* (1) was precisely in point. I am quite unable to find any distinction between the two cases so far as regards those two questions. There is a distinction to which I will allude in a moment. It is not perfectly clear what was the view taken by the Court of Appeal of *Wilson* v. *Poe* (1). They felt pressed, obviously, by the injustice of permitting an earlier incumbrancer, by reason of the form of the judgment, to sweep off the whole of this amount, exceeding the penal sum in his bond, to the prejudice of the subsequent incumbrancers, and they indicated the opinion that *Wilson* v. *Poe* (1) would not nowadays have been decided as it then was, the view taken of the effect of a judgment and the impossibility of dealing with it otherwise than strictly according to its terms being more rigid in those days than it would be at present. They found their way out of yielding to the judgment in *Wilson* v. *Poe* (1) by relying upon the judgment in another case decided previously by the same learned Lord Chancellor, the case of *O'Connell* v. *McNamara* (2), where he said that he would not, when he was asked to do anything which rested

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

(2) 3 D. & War. 411.

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upon a judgment which was obviously erroneous, perpetuate the error.

Now, my Lords, in the view which I take of the case, I am not prepared to advise your Lordships to overrule the case of *Wilson* v. *Poe* (1). It was of course contended in this House that although binding upon the Court of Appeal in Ireland it was not binding here, and that it was open to your Lordships to reverse that decision. My Lords, it would be extremely dangerous, as regards the construction placed upon the terms of a judgment some forty or fifty years ago, and which had remained undisturbed down to the present time, to pronounce any decision in conflict with it; because it is impossible to say how many transactions may have taken place, or affairs been regulated, upon the faith of such a judgment as that. Nor, my Lords, do I see any reason to doubt that the construction of the judgment in *Wilson* v. *Poe* (1) was correct; the judgment, in fact, was incapable of any other construction than that which was put upon it; because the words were absolutely precise, that the parties were entitled to the principal sum and interest until paid. There can be no two opinions about the meaning of those words. Nor, my Lords, am I prepared to dissent from the view that so long as the judgment stood in that form the judge of the Land Court would be bound to respect it and to act upon it. The jurisdiction of the Land Court is a statutory jurisdiction. It is now a branch of the High Court; but still the judge of the Land Court Division sitting as such is but the successor of the old Land Court judge, and exercises the same statutory jurisdiction. The 12 & 13 Vict. c. 77 s. 41 points out what course he is to take. It provides that "where any sale shall be made of any land or lease or part thereof, in respect of which there shall have been a decree of a Court of Equity, or any proceedings pending in a Court of Equity, the Commissioners shall, in distributing such moneys and in their other proceedings, have regard to the proceedings in such Court in relation to the priorities and rights of incumbrancers and others." Now nothing can be more precise than those words: "And where there shall have been a decree of a Court of Equity the Commissioners shall, in distributing the

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

moneys arising on the sale and in their other proceedings, proceed upon and be guided by the declarations of and inquiries and proofs made and taken under such decree in relation to such priorities and rights as aforesaid. Provided that it shall be lawful for the Commissioners, where it shall appear to them that there is any clerical error or any error of names or in computation or other like error in such decree, or in any finding or proof, or where from matters coming to their knowledge it shall appear to them that the Court in which the decree has been made should have an opportunity of reconsidering such decree, or considering or reconsidering any finding or proof, to direct such person as the Commissioners may think fit to apply to such Court in relation thereto, and such Court may make such order concerning the matter of such application as it may think fit."

To act, therefore, upon the decree, even assuming it to be erroneous, provided that there were no steps taken to set it right, would be the proper course. But, my Lords, that provision in the statute to which I have just referred indicates that although the Land Court is bound by a decree as to the rights of incumbrancers pronounced in a suit pending in a Court of Equity, yet nevertheless it is perfectly legitimate—indeed, more than that—it is the duty of the Land Court, if it thinks that there is some error which is capable of correction and ought to be corrected, to adjourn the case in order that the proper steps may be taken for its correction.

It seems to have been thought that *Wilson* v. *Poe* (1) had decided that, even although the form of the judgment appeared to be what it was by reason of a slip in drawing it up, the error or the omission in that respect was incapable of correction. I do not so read *Wilson* v. *Poe* (1). The Lord Chancellor, although no doubt he did not in that proceeding make any correction but acted upon the judgment, yet himself pronounced that in his belief the judgment had the form it had by reason of a slip. It is necessary to call your Lordships' attention to the exact manner in which the case of *Wilson* v. *Poe* (1) arose. In that case the Master had made a report in which he had acted upon a decree such as your Lordships have to deal with in the

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

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present case, which did give a person who was an incumbrancer by reason of the judgment the principal sum and interest until paid. To that objection was taken that the decree ought not to have given any right beyond the penal sum of the bond. The argument against that objection was that it went to the decree upon the words of which the report was founded, and was therefore an attempt to vary a decree upon exceptions, which that Court could not do, that it was not competent to that Court upon exceptions to make any order which was not consistent with the original decree. Now that was the argument relied on, and that was the argument to which Mr. Blackburne, the Master of the Rolls, yielded, and all that he held was, that the original decree standing in the form in which it was you could not except to the Master's report, which was consistent with the decree, on the ground that the decree was erroneous in form (1). That was the decision which came before the Lord Chancellor in the case of *Wilson* v. *Poe* (2) and he affirmed that decision. He said that he had no doubt as to the construction of the decree; that there was not an error upon the face of the decree, and that therefore the decree standing as it did the Master's report could not be said to be open to exception, because all he had done was to act upon a decree which was not erroneous upon the face of it. But, my Lords, there was, at that time, in force the 103rd General Order of 1843. It did not, of course, create rights, but it declared the practice and rule then prevailing in Equity. It provided that "any clerical mistake in a decree, or any error arising from any accidental slip or omission, may at any time be corrected on motion or petition." This having been pronounced to be an accidental slip by the Lord Chancellor, and that General Order existing, of which he must have been aware, I am at a loss to see what ground there can be for regarding the judgment of Sir Edward Sugden in the case of *Wilson* v. *Poe* (2) as in any way determining that it was a matter which was incapable of correction. On the contrary, he said at the end of his judgment in that case: "I think there has been a slip in this case." If that was so, the case was within the very terms of the 103rd General Order of 1843; and therefore, although I

(1) 8 Ir. Eq. Rep. 139. (2) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

am quite prepared to follow *Wilson* v. *Poe* (1) on the point which it determines, it does not, as it seems to me, in any way determine that this was a matter incapable of correction; I should draw the very contrary inference.

What then ought to be done in the present case? I think that if the strictly regular course had been pursued when the matter came before Gibson J. he should have adjourned the proceedings to give an opportunity for an application being made in the suit to have this error or omission corrected. The 103rd Order of 1843, of course, is not as such in force any longer; but the rule which has been made under the Judicature Act is in substantially the same terms, and the case equally falls within it. It was said first of all that this was not an error or omission within the meaning of this rule, because it was possible that the learned Lord Chancellor had intended to give these rights, even though he may have erred in point of law in giving them, that he may have thought that there were special circumstances which entitled the incumbrancer to a charge exceeding the penal sum in the bond. And cases were referred to in which it has been said that there may be circumstances under which more than the penal sum may be recovered by reason of the conduct of the debtor. Now, my Lords, I will not stop to inquire whether that could be so as regards the extent of the charge upon the land, or whether it is not merely a matter of personal obligation on the part of the debtor. But however that may be, no case was cited to your Lordships in which it had ever been held that the conduct of the debtor could entitle one incumbrancer to an extended charge of this description to the prejudice of a subsequent incumbrancer; and in the absence of authority I am absolutely unable to conceive a case in which it could be right, as between two incumbrancers, by reason of any conduct on the part of the debtor, to extend the charge of one incumbrancer beyond the penal sum in the bond to the prejudice of a subsequent incumbrancer.

Therefore, my Lords, having regard to the nature of this case, I am unable to see any ground upon which it can be said that this order, in the terms in which it was made, could have been

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

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intended to be made by the Lord Chancellor. I myself think that it was a mere accidental omission that the words were not inserted that in the case of a bond the amount should not exceed the penalty; and if attention had been called to the fact that those words were not so inserted, and that one incumbrancer might thereby be prejudiced as against another in respect of the omission, I cannot doubt that the correction would at once have been made.

Now the terms of the General Order are clear, that such a correction may be made at any time. It is true that many years have elapsed since the date of this order; but on the other hand nothing has been done since the date of this order until recently, when the money being found in Court the matter was revived. I cannot see any difference in the circumstances of this case from what they would have been if the matter had arisen immediately after judgment was pronounced.

This being so it seems to me that upon an application being made in the suit, the proper course would have been, and must have been, in accordance with the rule which I have read, to correct the decree pronounced in that suit: and then the rest would have followed, because if that decree had been corrected in the manner to which I have alluded, the rights of the parties would have been clearly defined.

There is one observation which I ought to make, and it is this, that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to shew that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made. There might be a ground of that description which would induce the tribunal to say "No: although this is a slip, and one which would have been corrected at the time, you have delayed so long that you have allowed rights to grow up which it would now be unjust to prejudice, and it is impossible to make the correction." But, my Lords, no facts were put before your Lordships in the present case which would justify the

Court in so refusing to correct the error. It was put to the learned Attorney-General whether, supposing the view of the law were taken which I have expressed to your Lordships, he would desire that the case should be adjourned, in order that it might go back to have an application made in the suit for the correction of the decree. He very wisely, in the interest of his client, said that he had no such desire, and assented to the case being dealt with by your Lordships upon the footing that such an application had been made; because there can be no doubt that if he had taken the other course, although possibly it might have been necessary for your Lordships to adjourn the case to give an opportunity for such an application, the only result would have been to saddle his client with additional costs.

Under these circumstances it seems to me that, being in a position to deal with the case as if an application had been made to correct the judgment, your Lordships' course is clear. The appellant has got substantially, by the judgment of the Court of Appeal, what he was entitled to get; he has got his right to £1000 affirmed; he has got it declared that he is not entitled to more; the other matters which I have dealt with are clearly mere matters of machinery and procedure; although perhaps it might have been difficult, and it certainly would have been objectionable, for your Lordships to treat as of no importance the fact that the proper course of procedure had not been followed in the present case, or to assume that the judge of the Land Court, because he is now a judge of the Chancery Division, could, without any application in the suit, but only on application to him in the matter in the Land Court, have made the correction of the Lord Chancellor's decree which was desirable.

Under these circumstances I move your Lordships as follows: That the parties by their Counsel consenting that the matter should be dealt with as if an application had been made in the suit of *Hill* v. *Knipe* to correct the decree in Chancery in Ireland, dated the 9th of June 1853, as regards such parties by inserting the words "in the case of judgments on bonds the principal sum and interest not to exceed the amount of the penalty on such bond," this appeal be dismissed with costs.

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LORD WATSON:—

My Lords, although I do not altogether concur in the reasons which were assigned by the learned judges of the Court of Appeal in Ireland, I am of opinion, with your Lordships, that their judgment ought to be affirmed.

I agree with them in holding that the decree of the Lord Chancellor, dated the 9th of June 1853, is so expressed as to carry interest at 6 per cent. until the principal sum of £500 is paid; and that the omission from the decree of words restricting interest to the limit of the penal sum is due to an accidental slip. The law forbids the allowance of interest exceeding the limit, unless there be exceptional circumstances to justify it. I think it is doubtful whether the excess ought in any circumstances to be made a charge upon the land; and I entertain no doubt that, whatever may be the case as between creditor and debtor, the misconduct of the latter can afford no ground for allowing interest beyond penalty to one creditor in prejudice of another. Yet the decree as it stands not only allows the excess, but makes it a charge upon the land, and that to the prejudice of a creditor having a posterior charge. I can hardly conceive that the learned judge who made the decree could have had any one of these things in his contemplation. A perusal of the decree itself satisfies me that he never dealt or meant to deal with any question of extending interest, or of varying the rights of creditors, and that he intended his decree to be drawn up in conformity with the legal rights of the creditors as these appeared in the report of the Master and relative schedules.

When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The correction ought to be made upon motion to that effect, and is not matter either for appeal or for rehearing. The law upon this point was fully and satisfactorily discussed by the late Lord Justice Cotton in *Mellor* v. *Swire* (1), an authority which appears to me fully to bear out the proposition I have just stated. I am

(1) 30 Ch. D. 239.

unable to regard *Wilson* v. *Poe* (1) as a decision the other way. In that case, it is obvious that the only question the parties had raised was as to the construction of the decree. Sir Edward Sugden said, "If that be error it must be corrected in a different way." The language of the Lord Chancellor does not suggest that the error, if it existed, was incurable, but, on the contrary, plainly implies that it might be corrected on a proper application for that purpose, although his Lordship had no power to make the correction in the proceeding then before him.

I think it is clear that a decree of the Lord Chancellor could not be corrected by a judge sitting in the Land Court. The proper course to follow would have been that which is indicated in 12 & 13 Vict. c. 77, s. 41, and also in the rules, namely, to stay proceedings, so as to give the present respondent an opportunity of having the error corrected in the Court of Chancery. Independently of any statute or statutory order, that would, in my opinion, have been the right course to pursue; but no application to that effect was made to Gibson J. In the Appeal Court the respondents moved for leave to appeal against the decree of 1853, which the Court had no power to grant. Had it not been for the concession very properly made by the Attorney-General, it would have been necessary for your Lordships to supersede the consideration of this appeal in order to enable the respondent to apply to the proper Court. Seeing, however, that the parties have enabled us finally to dispose of this appeal, it becomes unnecessary to discuss the point farther, or to consider whether the Appeal Court, when the case was before it, would have had jurisdiction to correct the decree.

LORD MACNAGHTEN :—

My Lords, I must say I think this is a very plain case.

Apart from a question as to the mere form of the procedure, which I will refer to presently, I think the conclusion at which the Court of Appeal has arrived is perfectly correct, though I have some difficulty in following the steps by which that conclusion has been reached.

It seems to me that the order in *Wilson* v. *Poe* (1) on which

(1) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

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the learned Attorney-General so much relied was quite right. Properly understood it is not, I think, in any way adverse to the respondent's case. It seems to me, moreover, that *O'Connell* v. *McNamara* (1) is not in conflict with *Wilson* v. *Poe* (2). And, with all deference to the Court of Appeal, I am unable to see how the ruling in *O'Connell* v. *McNamara* (1) can be applied to the present case.

The decree in *O'Connell* v. *McNamara* (1) was made on a bill to carry into execution the decree in *Cox* v. *McNamara*. In such a proceeding no doubt the Court sometimes reconsidered the directions in the former decree and varied them in case of a mistake, though sometimes, as Lord Redesdale says, the Court seems to have thought that the law of the decree ought not to be examined on a Bill to carry it into execution. In the present case there is no Bill to carry into execution a former decree, nor is there anything analogous to such a proceeding. There is no difficulty or complication or change of interest or creation of new interests, such as under the old practice would have required or justified an application to the Court by a Bill to carry into execution a former decree.

The Lord Chancellor's decree of the 9th of June 1853, in the cause of *Hill* v. *Knipe*, declares that the several sums in the Master's report found due to the plaintiffs and the other reported creditors, with interest upon the principal moneys reported due from the 1st of April 1853 "until paid," are well charged upon the lands mentioned in the report. That declaration, as it seems to me, can only mean that interest on the principal sums reported to be due was to continue to run until the principal was paid. There is nothing on the face of the decree to suggest that anything but payment would stop the running of interest.

But then comes this question, Was that declaration as regards interest an adjudication by the Court, or was it a slip or blunder on the part of the officer whose duty it was to draw up the decree? We have before us the report on which, and on which alone, the Lord Chancellor's decree was founded. We have before us all the evidence on which that report as to Miss

(1) 3 D. & War. 411. (2) 2 J. & Lat. 765; 9 Ir. Eq. Rep. 114.

Benson's charge was made. To me it seems to be absolutely clear, as indeed it has seemed clear to every judge who has had anything to do with the case, that the whole difficulty has arisen from a mere slip of the registrar or the registrar's clerk. There has been an accidental omission. The registrar ought to have inserted the usual formula to denote that interest was not to run beyond the penalty of the bond in the case of every judgment on a bond with a penalty. It is common practice, at least in this country, that an error in a decree arising from any accidental slip or omission may at any time be corrected without an appeal. Indeed, in this country there has been a General Order to that effect ever since April 1828; and such an order is to be found in the Rules of the Supreme Court, both in England and Ireland.

It may be asked, Why was not the error in the decree of *Cox* v. *McNamara*, which was an error of the same kind, corrected as an accidental slip? The answer probably is that at that date there was no general order in Ireland corresponding with the General Order in England of April 1828. But within a few months after the decree in *O'Connell* v. *McNamara* (1) such an order was made in Ireland. It was, we were told, Order 103 of the Orders of 1843.

Then, said the Attorney-General, the difficulty in *Wilson* v. *Poe* (2) was caused by a slip: the Lord Chancellor said so himself: there was a slip order (I use the usual term by which such an order is known in England) in force at that time; and yet the Lord Chancellor did not correct the mistake. That is quite true. He could not have corrected it then and there. *Wilson* v. *Poe* (2) came on upon exceptions to the Master's report. The Master, of course, could not correct the Lord Chancellor's decree. Nor could the Lord Chancellor himself have corrected it on an appeal from the Master. But when the Lord Chancellor observed, "if that be error it must be corrected in another way," and then refused the successful party costs on the ground of there being an accidental slip, it seems to me that he gave a very broad hint to the appellant to get the blunder corrected on an application under the slip order. Whether the blunder in the decree in

(1) 3 D. & War. 411.

(2) 9 Ir. Eq. Rep. 114.

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Wilson v. *Poe* (1) was afterwards corrected or not, I do not know. The learned counsel at the Bar could give us no information upon the point. But certainly there is nothing in the report of the case to prove that it was not corrected immediately afterwards. It was observed during the argument in this case that the Slip Order of 1843 was not even referred to in the course of the discussion in *Wilson* v. *Poe* (1). It is enough to say that the slip order would have been wholly irrelevant to the question then before the Court. No doubt that was the reason why the very learned lawyer who was counsel for the appellant did not allude to it.

Then, said the Attorney-General, "forty years have passed since the decree in *Hill* v. *Knipe*; after such a lapse of time the decree must stand, whether it be right or wrong; it cannot be touched now." But, my Lords, lapse of time has nothing to do with the question. The present Order, following the Slip Order of 1843, says that the correction of an error arising from an accidental omission may be made at any time. For many years after 1853 the point was immaterial. Then, shortly after the distribution of the funds in 1859, the solicitor of the party having the carriage of the order died. Nobody supposed there was any more money to divide. No one moved in the matter. The funds remaining in Court, or some of them, were carried to a dormant account. Everything was forgotten until quite recently, when it was discovered apparently by accident that there were in Court some remnants of funds which might be dealt with under the decree of 1853. For all practical purposes, as regards the present question, the matter is in the same position as if the application had been made thirty years ago. I may add that I doubt whether it could ever be argued that such an application comes too late as long as the fund intended to be dealt with remains in the hands of the Court.

Lastly it was suggested that possibly the Lord Chancellor's decree of 1853 as regards the direction as to interest was made advisedly. Everything is possible. Even a Lord Chancellor may possibly make a mistake. But one must use one's common sense, and there are some mistakes which it is hardly decent to

(1) 9 Ir. Eq. Rep. 114.

attribute to the Court. I have no doubt that the Court intended to make the "usual order." Probably counsel only asked for the usual order, and the Court simply assented. It is impossible to conceive that the Court, with its eyes open, could have given interest beyond the penalty of the bond. The law is perfectly clear. The Court has never done more than give interest beyond the penalty as against the obligor himself, in consequence of some misconduct on his part or by way of relieving him from the penalty if he came for relief, a "whimsical" mode of relief, as the Lord Chancellor observes in *Clarke* v. *Seton* (1), "for they relieved him against the penalty; but the consequence was that he was obliged to pay a great deal more, for then they made him pay the original debt with the interest, which was much beyond the penalty."

I took the liberty of asking the learned Attorney-General if he could produce any authority to shew that interest beyond the penalty could be justified in a case like this by any special circumstances. Of course no such authority could be produced. But there is an authority rather in point, I think, the other way, to which I will venture to call your Lordships' attention. In *Mackworth* v. *Thomas* (2) a Bill was filed by the creditors of a deceased debtor to obtain satisfaction out of the real estate, the personal estate being insufficient. One creditor for a special reason claimed interest beyond the penalty of his bond. The Lord Chancellor said: "Is it possible for the Court to let a creditor stand as a specialty creditor for more than the debt at law? . . . I cannot put a larger sum into the bond than the parties have. I do not know what I might do against the party; but in the administration of assets I should injure all the creditors . . . . There never was a case in this Court where the Master, in the account of assets, ever allowed a bond to be rated higher than the penalty."

In the result, therefore, I am of opinion that there is a mistake in the decree of 1853, occasioned by an accidental omission, and that that mistake ought to have been corrected as a matter of course.

Then comes the question, Whose was the proper hand to make

(1) 6 Ves. 416. (2) 5 Ves. 328.

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the correction? There was the Lord Chancellor's decree of 1853. Then the matter was taken into the Encumbered Estates Court. The Encumbered Estates Court was at that time merely auxiliary to the Court of Chancery. The Commissioners could not make even the most trifling correction of any report or decree of the Court of Chancery. But they were authorized, if they thought there was any error, to direct an application to be made to the Court of Chancery, and that Court might make such order concerning the matter of such application as it might think fit (12 & 13 Vict. c. 77 s. 41). Then the Landed Estates Court, Ireland, was established in 1858, and replaced the Commissioners, but with greater powers. Lastly, by the Judicature Act (40 & 41 Vict. c. 57 s. 7) the judges of the Landed Estates Court were made judges of the Chancery Division of the High Court. The 25th section of that Act directs that every decree of any Court whose jurisdiction is by the Act transferred to the High Court, which shall have been duly perfected at any time before the commencement of the Act, may be executed and enforced, and if necessary amended, by the High Court, as if it had been a decree of the said High Court. Now the suit of *Hill* v. *Knipe* is attached to the Court of the Master of the Rolls, and the Master of the Rolls, by his order of the 18th of February 1891, has transferred all the funds in Court to the credit of the matter in Land Judges Division entitled "In the Matter of the Estate of George Knipe, Owner; Adam Hill and Another, Petitioners." When you add to that this circumstance, that by the 39th section of the Judicature Act it is provided that in any proceeding before a land judge, the land judge is to decide all controversies and questions as to the validity or effect of any charge upon land, it might be argued, I think, with some plausibility, that the land judge himself might have corrected the decree in *Hill* v. *Knipe*. But, on the whole, probably the better view is that the decree ought to have been corrected by the Master of the Rolls at the request of the land judge. This, however, is a mere question of form upon which it is not necessary to pronounce an opinion, because the Attorney-General has very properly consented, that if your Lordships should think that it is a proper case for

correction under the slip order, but that the application to correct the decree ought in the first instance to have been made to the Master of the Rolls, your Lordships should be at liberty to deal with the matter without sending it back to the Chancery Division.

LORD FIELD:—

My Lords, I fully concur in the motion that is proposed to be made, and I cannot usefully add anything to the observations which have been made by my noble and learned friends.

The parties by their counsel consenting that the matter should be dealt with as if an application had been made in the suit of Hill *v.* Knipe *to correct the decree in Chancery in Ireland dated the 9th June* 1853 *as regards such parties by inserting the words "in the case of judgments on bonds the principal sum and interest not to exceed the amount of the penalty on such bond," and as if such correction had been made on such application, Order appealed from affirmed and appeal dismissed with costs.*

Lords' Journals 27th June 1892.

Solicitors for appellant: *Campbell, Reeves, & Hooper, for Weldon C. Molony, Dublin.*

Solicitors for respondent: *Field, Roscoe & Co., for John A. French, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.) 1892 *April* 9.

THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY AND COUNTY OF NEWCASTLE-UPON-TYNE . . . } APPELLANTS;

AND

THE ATTORNEY-GENERAL ON THE RELATION OF THE BYKER BRIDGE COMPANY . . . . . } RESPONDENT.

(CROSS APPEAL.)

THE ATTORNEY-GENERAL ON THE RELATION OF THE BYKER BRIDGE COMPANY . . . . . } APPELLANT;

AND

THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY AND COUNTY OF NEWCASTLE-UPON-TYNE, AND THE NORTH EASTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

(EX PARTE AS TO THE NORTH EASTERN RAILWAY COMPANY.)

Municipal Corporation, Contract by—Capacity to Contract—Ultrà Vires—Borough Rates, Misapplication of—Improvement Rate—Surplus of Borough Fund—Agreement to make Annual Payments for use of Bridge in Borough for Foot-passengers, how far valid—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50), *ss.* 140, 143, 144.

A municipal corporation, which was subject to the Municipal Corporations Act 1882 and a Local Improvement Act, agreed with a railway company to pay the company a certain annual sum for fifteen years in consideration that the company would throw open the roadway of a bridge belonging to them within the borough for the use of foot-passengers free from toll. The local Act authorized rates for certain purposes not including such a bridge as the agreement referred to, and provided that the money accruing from the general rate should be applied to certain specified purposes "and subject thereto for the improvement or benefit of the borough in such manner as the corporation from time to time think fit in as full and ample a manner as any borough rate authorized by the Municipal Corporations Acts is made applicable." An action having been brought by the Attorney-General at the instance of relators against the corpora-

tion, claiming an injunction to restrain the corporation from making the said payments out of moneys derived from the rates and a declaration that the agreement was ultrà vires and void:—

Held, affirming the decision of the Court of Appeal (23 Q. B. D. 492), that there must be a declaration that the corporation were not entitled to pay any moneys (which might become payable under the agreement) out of the borough fund, nor to make any borough rate nor any general or improvement rate under the Municipal Corporations Act 1882 or the local Act for the purpose of such payments; but that the agreement was not ultrà vires or void, and that the foregoing declaration was not to prevent the corporation from paying such moneys out of any surplus which there might be of the borough fund or of the aforesaid rates after applying the same respectively to the purposes for which they might respectively be made under the provisions of those Acts, with liberty to the plaintiff to apply for an injunction if necessary.

IN this case there was an appeal by the Mayor &c. of Newcastle-upon-Tyne, and a cross-appeal by the Attorney-General on the relation of the Byker Bridge Company, against an order of the Court of Appeal (1).

The action was brought by the Attorney-General on the relation of the Byker Bridge Company against the corporation of Newcastle-upon-Tyne and the North-Eastern Railway Company in order to obtain a declaration that an agreement entered into on the 11th of April 1888 between the corporation of Newcastle-on-Tyne and the North-Eastern Railway Company was ultrà vires and void. The plaintiff also claimed an injunction to restrain the corporation from applying, and the company from receiving, moneys derived from the city funds or from the rates for the purpose of the annual payment of £600 provided for by the agreement. The Byker Bridge Company was incorporated by Act of Parliament, and was thereby authorized to construct a bridge for carriage traffic and foot-passengers across the Ouseburn Valley, and to charge tolls to foot passengers using the same. In pursuance of this Parliamentary authority they constructed the bridge, and received considerable sums of money by way of toll from passengers using it. The North-Eastern Railway Company owned another bridge across the Ouseburn Valley, and charged tolls for the use of it by foot passengers.

The corporation of Newcastle-on-Tyne having come to the conclusion that it would be for the benefit of the city to provide

(1) 23 Q. B. D. 492.

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free access to passengers across the Ouseburn Valley, entered into an agreement dated the 11th of April 1888 with the North-Eastern Railway Company, which gave rise to the present controversy. By this agreement the corporation agreed to pay the company an annual sum of £600, in consideration of their opening the roadway of the railway bridge free for the use of foot passengers. The agreement was to continue in force for fifteen years and thenceforth, till twelve calendar months' notice given by either party.

At the trial, before Wills J. without a jury, the learned judge held that the agreement was valid, and that the corporation were entitled to make the payment provided for by the agreement out of any surplus of their borough fund, and also out of their improvement rate, after the expenses of carrying the Improvement Acts into execution had been defrayed, and it is to be gathered that he was of opinion that they were entitled to take this purpose into consideration in deciding what rate they would levy. The learned judge accordingly dismissed the action with costs. The Court of Appeal (Lord Esher M.R., Lindley and Bowen L.JJ.) discharged this order. They concurred in thinking that the agreement was not invalid, but made an order declaring that the corporation were not entitled to pay any moneys, which were or might become payable under the contract of the 11th of April 1888, out of the borough fund, nor to make any borough rate, nor any general or improvement rate, under the powers conferred upon the corporation by the Municipal Corporations Act 1882 and the Newcastle Improvement Act 1865 respectively, for the purpose of enabling the corporation to pay any such moneys; but the foregoing declaration was not to prevent the council or corporation from paying such moneys out of any surplus there might be of the borough fund or of the aforesaid rates, after applying the same respectively to the purposes to which the same might respectively be made under the provisions of the aforesaid Acts, with liberty to the plaintiff to apply for an injunction if necessary (1).

(1) Sect. 143 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) enacts that "if the borough fund is more than sufficient for the purposes to which it is applicable under this Act, or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borou h."

The appeal and cross-appeal were heard on the 10th and 16th of May 1892. On the cross-appeal which raised the question of the validity of the agreement, the same points were urged and authorities cited which appear in the report of the decision of the Court of Appeal (1). The argument on the appeal turned on the special provisions of the Newcastle-upon-Tyne Improvement Act 1865 (28 & 29 Vict. c. ccl.) which are discussed in the judgment of Lord Herschell.

Sir *H. James* Q.C. and *Cohen* Q.C. (*Dugdale* Q.C. and *W. Graham* with them) for the corporation.

Sir *R. E. Webster* A.G. and Sir *H. Davey* Q.C. (*Danckwerts* with them) for the Attorney-General.

The House took time for consideration.

Aug. 9. LORD HERSCHELL (after stating the facts above set forth, proceeded as follows):—

My Lords, I may dispose in a few words of the plaintiff's appeal, which presents no real difficulty. I think it is impossible to hold that the contract was ultrà vires or void. The fact that there might be a difficulty in obtaining satisfaction of a judgment recovered in respect of payments to be made under the agreement, or that there might be no funds or property available to satisfy it, does not in my opinion shew that the agreement is ultrà vires and void. In the present case it is not established that the corporation can under no circumstances be in a position to make the payments provided for; and there appears to me to be no solid ground for the contention that the agreement was ultrà vires and void.

The appeal of the corporation raises a question of considerable importance, and which is not without difficulty. The appellants impeach the declaration of the Court of Appeal that they are not entitled to make an improvement rate for the purpose of enabling them to make the payments which by the agreement they have bound themselves to make. It was strenuously contended that

(1) 23 Q. B. D. 492.

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they had power to make a rate for any purpose which, in their judgment, was for the improvement or benefit of the borough, provided that such rate did not exceed the statutory limit.

In support of this contention they placed their reliance upon the 149th section of the Newcastle-upon-Tyne Improvement Act 1865. That section provides that money accruing to the corporation from the improvement rate shall be applied (1.) in payment of the expenses of obtaining the Act, (2. and 3.) in payment of the interest and instalments due in respect of money charged on the improvement rate, and (4.) "in carrying the several purposes of this Act and of the several recited Acts into execution and for the improvement or benefit of the borough in such manner as the corporation from time to time think fit." This section, it was argued, conferred the power to levy an improvement rate in order to raise money for any purpose which the corporation deemed for the improvement or benefit of the borough. It was, of course, admitted that the rate must not exceed the limit imposed by the statute, but it was said that this was the only limitation.

By the 131st section of the Act of 1865 the improvement rate was not to exceed 1*s.* in the pound. By the Improvement Act of 1853 a rate was sanctioned for improvement purposes not exceeding 3*d.* in the pound. The Act of 1865 recited that it was expedient that the improvement rate under the Act of 1853, and the new streets rate under the Act of 1855, be consolidated into one rate not exceeding 1*s.* in the pound, to be called the improvement rate. This was carried into effect by the 131st section to which I have just referred. I cannot entertain any doubt that in fixing this limit regard was had to the improvements in the way of new streets specifically authorized by the Legislature.

But the matter does not rest there. An Improvement Act of 1877 empowered the execution of certain street improvements and tramway works and by sect. 50 extended the limit of the improvement rate to 1*s.* 3*d.* in the pound. Again, in 1882, another Improvement Act was passed, which recited that inasmuch as it was by the Act of 1877 "provided that the expenses of carrying into execution certain of the provisions of that Act should be paid out of the improvement rate, the limit thereof

was extended to 1*s.* 3*d.* in the pound," and that it was expedient that the expenses of carrying into execution certain of the purposes of the Act of 1882 should be charged on the improvement rate, and that the limit of that rate should be further extended. Accordingly, by sect. 105, the limit of the improvement rate was extended to 1*s.* 6*d.* in the pound.

Now, nothing can be clearer than that these extensions of the limit of the improvement rate were made from time to time by reason of specific improvements having been authorized by the Legislature, the cost of which was to be defrayed out of or made a charge upon that rate. Yet the argument for the appellants goes this length—indeed it cannot stop short of it—that the corporation might omit to execute all or any of the works specifically authorized, and levy the full rate of 1*s.* 6*d.* in the pound in order to expend it in any manner which they thought for the improvement or even for the "benefit" of the borough. These considerations seem to me cogent to shew that unless the language of the enactment compels your Lordships to do so you ought not to yield to the appellants' argument.

But it is to be observed, in the first place, that the 149th section of the Act of 1865, on which their case is rested, deals only with the application of the money raised by the improvement rate; it is not concerned with the levying of that rate, and confers no authority in that respect. The power to levy the rate is given by the 129th section, which provides that the expenses of carrying into execution the Act of 1855, and "subject to the other provisions of this Act all the expenses of carrying into execution this Act . . . shall be defrayed by a rate to be called the improvement rate, which the corporation are hereby authorized to levy from time to time." The section, which thus gives the power to levy the rate, indicates, I think, the purposes for which it may be levied. These are to meet the expenses of carrying into execution the Acts of 1855 and 1865. I think it impossible to contend that expenditure "for the improvement or benefit of the borough," within the concluding words of sect. 149, is expenditure incurred in carrying the purposes of the Act of 1865 into execution, for the words follow and are coupled by the conjunctive "and" with those which authorize the application of

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the rate to "carrying into execution the several purposes of this Act."

It was contended that the power to levy an improvement rate could not be confined in the manner I have indicated, inasmuch as the 149th section directs the application of money accruing to the corporation from the rate to carrying the purposes of "the several recited Acts" into execution. One of these Acts, it is said, is the Improvement Act of 1853, and if the 129th section of the Act of 1865 defines the purposes for which an improvement rate may be levied, it would not be lawful to levy one for the purpose of carrying into execution the Act of 1853. Having regard, however, to the repeal of many of the provisions of that Act by the Act of 1865, I am not sure that there remained any of the purposes of the Act of 1853 for which an improvement rate could be levied which were not covered by the provisions of the Act of 1865. But be this as it may, I do not think it would be legitimate to imply from the provisions relied on in sect. 149 an authority to levy a rate up to the statutory limit for any purpose which the corporation conceived to be for the improvement or benefit of the borough. Such a power would be, as far as I know, without precedent; it would certainly be very unusual. The statute your Lordships have to construe is a private Act obtained by the corporation. And considering the course of such legislation, I think it would not be right to construe the Act as having the effect contended for unless it gave the authority in express terms or by necessary and unequivocal implication. I think light is thrown upon the meaning of the words upon which so much has been rested by the provision to be found at the end of the preceding section. That section (s. 148) provides that the money accruing from the general rate shall be applied to the purposes of watching, lighting, paving, and sewering, "and subject thereto, for the improvement or benefit of the borough in such manner as the corporation from time to time think fit, in as full and ample a manner as any borough rate authorized by the Municipal Corporations Acts is made applicable." It is admitted that a general rate cannot be levied for the purpose "of the improvement or benefit of the borough," and that it is only any surplus which may arise that can be so applied; but it is said

that this is because power is only given to apply the money accruing from it to these purposes in as full and ample a manner as a borough rate, and the surplus only of the borough fund can be so applied. But I do not think this is a correct view; the words "in as full and ample a manner" are rather empowering than disabling words. The real explanation is this: sect. 148, like sect. 149, deals only with the application of the money which accrues to the corporation from the levying of the rate; it does not confer the power to levy it. This is derived from sect. 128, which distinctly indicates the purposes for which a general rate may be made. I think that in the case both of the general rate and of the improvement rate it is only a chance or accidental surplus which may be applied for the improvement or benefit of the borough, as the corporation may from time to time think fit. For these reasons I have arrived at the conclusion that the judgment of the Court below was right and ought to be affirmed, and these appeals dismissed, with costs; and I so move your Lordships.

LORD WATSON:—

My Lords, I concur in the judgment which has been moved, and also in the reasons which have been assigned for it by my noble and learned friend.

LORDS MACNAGHTEN, MORRIS, and HANNEN concurred.

Order appealed from affirmed and appeal and cross-appeal dismissed with costs.

Lords' Journals 9th August 1892.

Solicitors for the Corporation of Newcastle-upon-Tyne: *Collyer-Bristow, Russell & Hill, for Hill Motum, Newcastle-upon-Tyne.*

Solicitors for the relators: *Stibbard, Gibson & Co. for Gibson, Pybus & Pybus, Newcastle-upon-Tyne.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1892 May 31.

JANE WOOD or DARLING (Pauper) . . Appellant;

AND

WILLIAM GRAY & SONS . . . . . Respondents.

Master and Servant—Negligence—Injury to Workman resulting in Death after Action brought—Competency of Second Action by Mother for Solatium for same Injury.

A workman having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending he died, intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for solatium for her son's death, and asked that the second action should be remitted to the same jury who were to try the first action:—

Held, affirming the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 1164), that the second action was incompetent.

Appeal from a judgment of the Second Division of the Court of Session, Scotland (1).

On the 23rd of June, 1890, Alexander Darling, mason, met with an accident whilst occupied in the business of his employers, Messrs. William Gray & Sons, builders, Edinburgh, the respondents. He made a claim under the Employers' Liability Act, 1880, for damages, and on the 17th of October, 1890, raised an action in the Sheriff Court against the respondents in respect of his injuries. On the 25th of October he applied to the Court of Session for a trial by jury, and issues were settled, the action being remitted for trial by jury before Lord Low.

On the 6th of January, 1891, Alexander Darling committed suicide, his mind, it was alleged, being affected by the nature of his injuries. He died unmarried and intestate and before his case was tried.

On Alexander Darling's death, Mrs. Jane Wood or Darling, his mother, the appellant, lodged a notice in the Court of Session desiring to be sisted executrix dative in the action of her son. And on the 30th of April, 1891, she raised another action which was the subject of this appeal, against the same respondents and

(1) 18 Court Sess. Cas. 4th Series (Rettie), 1164.

defendants, claiming damages in the way of solatium for her son's death, which she alleged was due to the accident, and she asked for an issue which could be tried before the same judge and jury at the same time as the first action. She alleged that her son was her sole means of support, and that he spent his entire income in maintaining the house where they resided together.

The respondents objected to the second action as incompetent, in respect that the son's action arising out of the same cause was pending and still being insisted in. On this ground the Second Division of the Court of Session by interlocutor, dated the 14th of July, 1891, dismissed with costs the appellant's second action as incompetent.

On appeal,

1892. March 25. *Rhind* and *Kennedy* (both of the Scotch Bar), for the appellant:—

By the law of Scotland, if a person, injured by the negligence of another, has commenced an action for damages and dies before verdict, his executor can continue such action: *Neilson* v. *Rodger & Sons* (1). Secondly, if the injured person dies without raising an action, certain relatives of the deceased may sue for their own suffering and loss: *Weems* v. *Mathieson* (2); *Eisten* v. *North British Railway Company* (3). Apart, therefore, from the fact that the previous action had been raised by the deceased, the appellant's second action for her own interest is competent. Nor can the continuance of the first action render the second incompetent, the injuries for which damages are sought not being identical in both actions.

By English law, on the death of Alexander Darling before judgment in his action, the maxim "actio personalis moritur cum personâ" would prevail, except where the remedy is given by statute; but by Scotch law it would not, and Alexander Darling could have settled for his claim or left it by will, in either of which case the appellant could not have received

(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 325. (2) 4 Macq. 215.
(3) 8 Court Sess. Cas. 3rd Series (Macpherson), 980.

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any of the damages due to her son. But he could not settle for or bequeath the damages his mother might be entitled to for her own suffering and loss through his death. In *Leggott* v. *Great Northern Railway Company* (1) the wife and children having obtained damages under Lord Campbell's Act (9 & 10 Vict. c. 93), the wife raised a second action, as her husband's administratrix, for expenses in managing his business and for medical attendance: held, that the second action was not barred. This action is merely a development of the old action for assythment—a consideration given to repair the damage suffered by the wife, children, or next of kin of the injured or deceased—and *Drew* v. *Horn* (2) is a direct instance of a second compensation. In the last century several actions of assythment were actions for damages for death through negligence without allegation of crime. See *Black* v. *Caddell* (3); Lord Ormidale in *Horn* v. *North British Railway Company* (4); Bankton's Inst., vol. i., pp. 246–8; Stair 1, 9, 7. Lords Murray and Wood said in *Neilson* v. *Rodger & Sons* (5), that if an executor had recovered, the relatives could also recover. In *Auld* v. *Shairp* (6) the widow, as executrix and as an individual, was held entitled to sue on account of a libel on her husband for which he had raised no action. There could be no inconvenience in trying these two actions together; and the Employers' Liability Act (43 & 44 Vict. c. 42), appears to contemplate that there may be an action by the executor and also an action by the deceased's relatives.

The *Solicitor-General for Scotland* (*A. Graham Murray*, Q.C.), and *C. N. Johnson* (of the Scotch Bar), for the respondents:—

It is an accepted principle of the law of Scotland, as also of England, that "nemo debet bis vexari pro unâ et eâdem causâ": *Stevenson* v. *Pontifex and Wood* (7).

(1) 1 Q. B. D. 599.
(2) Mor. Dict. 13904.
(3) Mor. Dict. 13905; *Brown* v. *Macgregor*, Feb. 26th, 1813; 17 F. C. 232.
(4) 5 Court Sess. Cas. 4th Series (Rettie), at p. 1066.
(5) 16 Court Sess. Cas. 2nd Series (Dunlop), at pp. 328, 330.
(6) 2 Court Sess. Cas. 4th Series (Rettie), 191.
(7) 15 Court Sess. Cas. 4th Series (Rettie), 125.

And when the executor, legatee, or representative of a deceased person prosecutes the deceased's action for damages, it is competent for the jury to take into account, in assessing the damage, the fact of the supervening death of the deceased: *M'Master* v. *Caledonian Railway Company* (1); but no second action can be pursued unless the first action is abandoned. Lord Campbell's Act (9 & 10 Vict. c. 93), which made competent in England an action at the instance of certain relatives, by sect. 3 expressly provides, that no more than one action shall lie for and in respect of the same subject-matter of complaint. There is no ground for applying a different rule in Scotland.

In England where a workman accepted a sum of money in full satisfaction for the injury, it was held that the death of the workman did not create a fresh cause of action in favour of the widow: *Read* v. *Great Eastern Railway Company* (2). That case was approved in *Griffiths* v. *Earl of Dudley* (3), where it was held that a workman's widow suing for damages under Lord Campbell's Act was barred by her husband's agreement contracting himself out of the Employers' Liability Act. The same principle holds good in Scotland. In *Stevenson* v. *Pontifex and Wood* (4) the Lord President (Inglis) said: "A single act amounting either to a delict or breach of contract cannot be made the ground of two or more actions, for the purpose of recovering damages arising within different periods, but caused by the same act."

There was no doubt *Leggott* v. *Great Northern Railway Company* (5) was not in accord with *Read* v. *Great Eastern Railway Company* (2) or *Griffiths* v. *Earl of Dudley* (3).

The appellant's argument, based on the analogy of an action of assythment, is fallacious. See the Lord President (Inglis) in *Eisten* v. *North British Railway Company* (6): "This is not an action of assythment, and it does not partake in any degree of

(1) 13 Court Sess. Cas. 4th Series (Rettie), 252.
(2) Law Rep. 3 Q. B. 555.
(3) 9 Q. B. D. 357.
(4) 15 Court Sess. Cas. 4th Series (Rettie), at p. 129.
(5) 1 Q. B. D. 599.
(6) 8 Court Sess. Cas. 3rd Series (Macpherson), at p. 983.

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the nature of such an action, for this, among other reasons, that no crime has been committed."

Judgment after consideration.

LORD WATSON :—

My Lords, I am of opinion that the unanimous decision of the Second Division of the Court of Session, in this case, is in strict accordance with the existing law. The reasons assigned for it, which were delivered by Lord Young, are not fully expressed; but it sufficiently appears that the judgment of the Court proceeded upon the ground that the appellant's action was unknown to the law, and was therefore incompetent.

The maxim "actio personalis moritur cum personâ" has a very limited application in the law of Scotland; and, in evidence of that proposition, I need do no more than refer to the elaborate opinions of Lord Neaves and other judges in *Auld* v. *Shairp* (1). It is, in my opinion, unnecessary, for the purposes of this appeal, to examine that case, or to consider how far a bare claim in respect of personal injuries occasioned by the negligence of another constitutes a debt due to the party injured, which will pass, upon his death without having brought an action, to his personal representatives. The law has long been settled, that, when the deceased has instituted an action to enforce his claim, his executor can take up and insist in the process, to the effect of recovering the pecuniary damages to which the deceased was entitled.

The Court of Session, by a series of decisions which trench somewhat closely upon the province of the legislature, has, subject to certain limitations, sustained action at the instance of relatives of the deceased, in their own right, and not in a strictly representative capacity, against the parties whose negligence occasioned his death, for the loss which they personally suffered through that event. Your Lordships had recent occasion, in *Clarke* v. *Carfin Coal Company* (2), to consider the class of persons to whom such a right of action has been given; and it was

(1) 2 Court Sess. Cas. 4th Series (Rettie), 191. (2) [1891] A. C. 412.

there held, in accordance with the rule adopted in the Courts below, that it only comprehended those persons between whom and the deceased there existed a reciprocal obligation of support, in the event of either of them becoming indigent. The practical effect of your Lordships' decision was to limit the class to persons standing in the legitimate relation of husband, father, wife, mother or child, to the deceased. In *Eisten* v. *North British Railway Company* (1), which is the leading authority upon this branch of the law, the Lord President (Inglis) observed: "As the existence of such claims in our common law is a peculiarity of our system, it is not desirable to extend this class of actions, unless they can be justified on some principle which has been already established." In that observation, which has been repeatedly made, in different terms, by other judges of the Court of Session, I entirely concur. In *Clarke* v. *Carfin Coal Company* (2) I had occasion to say that the rule which admits the particular action with which we are now dealing, "does not rest upon any definite principle capable of extension to other cases which may seem to be analogous; but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom, and having no other ratio to support it."

The appellant maintained that, whenever an individual is negligently injured, there arises to each person standing towards him in the relation which I have explained, an independent right of action, contingent only upon his death sooner or later, and its being traceable to the injury which he received. For that proposition no authority whatever was produced, except the worn-out analogy of actions of assythment. It would be the merest waste of your Lordships' time to go back to our ancient authorities for the purpose of examining the nature of an action of assythment, and shewing that between it and an action by relatives, in respect of negligence, no analogy exists. In the case of *Eisten* v. *North British Railway Company* (1), already cited, the Lord President said: "This is not an action of assythment, and it does not partake in any degree of the nature of such an action." Lord Deas: "To such a case, I agree with your Lordships that

(1) 8 Court Sess. Cas. 3rd Series (Macpherson), 980, 984.
(2) [1891] A. C. at p. 418.

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the law of assythment is not applicable." Lord Ardmillan and Lord Kinloch expressed their opinion in similar terms.

To my mind, the only relevant question in the present case is, has the rule ever been carried so far as to recognise the competency of an action at the instance of relatives, where an action, in respect of the same injuria, has been raised by the deceased during his lifetime, and is still a depending litigation? Unless that question can be answered in the affirmative, the appellant's action is, in my opinion, incompetent.

There is no case to be found in the reported decisions of the Court of Session in which an action by relatives was sustained after the deceased's claim had been settled or extinguished by an adverse judgment, or where he had raised an action which passed to and might be insisted in by his executor; and the existence of such a right of action has not been affirmed, or even suggested, by any text-writer. There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act, leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised, they must bring one suit, and one only, in which the damages due to them respectively may be assessed. In that state of the law, I do not think this House ought to encourage the creation of a new right and corresponding liability which are at present unknown in Scotland.

LORD HALSBURY, L.C., and LORDS HERSCHELL and MORRIS, concurred.

LORD FIELD:—

My Lords, I entirely agree. It seems to me that after the intimation given by the learned judges of the Second Division, that the action was an entirely novel one, it became incumbent upon the appellant to produce authorities to satisfy your Lordships that that view was unfounded. The appellant did cite to your Lordships a great many cases. I have been carefully through them and have considered them, and it seems to me, as far as I can follow the question, that there is no foundation whatever for the appellant's contention. The maxim "nemo

debet bis vexari pro unâ et eâdem causâ" prevails in Scotland as well as in this country. H. L. (Sc.) 1892 WOOD v. GRAY & SONS.

I concur in the motion made by my noble and learned friend.

Interlocutor appealed from affirmed, and appeal dismissed.

Lords' Journals 31st May, 1892.

Agents for appellant: *Keeping & Gloag, Solicitors, for D. Howard Smith, Solicitor, Edinburgh.*

Agents for respondents: *Ingledew, Ince & Colt, Solicitors, for T. & W. A. M'Laren, W.S., Edinburgh.*

[HOUSE OF LORDS.]

HUGHES AND ANOTHER (TRUSTEES) . . . APPELLANTS; H. L. (Sc.) 1892 July 25

AND

EDWARDES AND ANOTHER (EX PARTE) . . RESPONDENTS.

Succession—Marriage Contract—Vesting—Conditio si sine liberis decesserit—Discharge of Trustees.

The rule "si sine liberis decesserit" applies to ante-nuptial marriage contracts.

By ante-nuptial contract of marriage, the wife conveyed a sum of £4000 to trustees. First, to pay the wife during the life of the spouses the interest for her alimentary use exclusive of the jus mariti: Secondly, in the event of the predecease of the wife leaving a child or children of the marriage, the trustees were to pay the income to the husband during his life for "his alimentary use only," his right to assign and claims of creditors being excluded; and on his death to pay the capital of the fund over to the said "child or children" after their attaining majority, &c. And if there were no children alive at the dissolution of the marriage by the wife's predecease, or though there should then exist a child or children, in the case of the death of all of them before the term of payment of their provisions, then the interest was still, as provided, to be paid to the surviving husband, but the capital was to be at the wife's disposal by will to be conveyed to the disponees on the husband's death, and, failing any will, then to the wife's nearest heirs and executors, but with power to the trustees to pay over the capital at any time after the death of the predeceasing wife and "failure of issue," on obtaining, inter alia, the consent of

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the surviving husband. Thirdly, in the event of the predecease of the husband, and a child or children being then in existence, the trustees were to pay the interest to the wife for her alimentary use only, and, after her death, the capital to the children on majority; but declaring always if such child or children should all die before the wife or should "die before majority and without leaving issue," the trustees were still to pay the interest for the wife's alimentary use only; and, in the event of the wife surviving the husband and "failure of issue," she was to have the same power as above of disposing by will of the capital. It was further provided that the provisions of the children should not become vested interests until after the death of the survivor of the spouses, and until the children attained majority.

The wife died, leaving by will all she possessed to her husband, by whom she was survived, and by one child, a son, stated to have been born subsequently to the wife's will. The son had no children. The husband and son claimed from the trustees immediate payment of the capital, on the ground that it must inevitably belong to one or the other :—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 319), that the husband and son were not entitled to immediate payment, the trustees being bound to keep alive the trust for the protection of the alimentary provision to the husband, and the right of possible children born to the son.

APPEAL against a judgment of the First Division of the Court of Session, Scotland (1), in an action of declarator raised by the respondents, Dr. Edwardes and his son, H. F. W. Edwardes, against the appellants, the trustees under the ante-nuptial marriage contract, dated the 20th of February, 1855, of Dr. Edwardes and his wife, then Mary Jane Naish.

The respondents did not answer the appeal.

The ante-marriage contract in question set out inter alia that Miss Naish on her part disponed and conveyed to the marriage contract trustees, the appellants, a sum of £4000, which had been presented and paid to her in view of her marriage by her step-father F. R. Hughes, as also her whole other means in possession or to be acquired during the marriage upon trust for the following purposes :—

First, that during the subsistence of the marriage, the trustees shall pay the free interest or annual produce of the foresaid sum of £4000, &c., to the said Mary Jane Naish, for her own personal and alimentary use, and exclusive of the jus mariti and right of administration of her husband; and with this declaration

(1) 18 Court Sess. Cas. 4th Series (Rettie), 319.

that the same shall not be assignable by her or liable to be attached for her debts or deeds, or her husband's.

Second, "If the marriage happen to be dissolved by the predecease of the wife, leaving a child or children of the marriage, the trustees shall pay the said free interest or annual produce to her said husband during his life for his liferent and alimentary use only, and with this declaration also that the same shall not be assignable by him nor attachable for his debts or deeds; and the capital of the said sums and estate hereby conveyed shall be paid and made over to the said child or children at the first term after their father's death, and after their attaining majority in the case of sons, and in the case of daughters on their attaining majority or being married as aftermentioned. And if there are no children alive at the dissolution of the marriage by the wife's predecease, or though there should then exist a child or children of the marriage, in case of the death of all of them before the terms of payment of their provisions as aforesaid, the said interest or annual produce shall still be paid to the surviving husband during his life, for his liferent and alimentary use as aforesaid; but the whole capital or fee shall be at and subject to the wife's disposal by will or other writing, whether executed according to the law of England or Scotland, and the said trustees on the death of the surviving husband shall be bound to convey or pay over the same to the disponees or assignees under any will or other writing which she may execute, and failing her executing any other such will or writing, then to her own nearest heirs and executors whomsoever, but with power to the trustees to convey or pay over the capital or fee of the said estate at any time after the death of the predeceasing wife and the failure of issue, on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will or settlement, or of her heirs and executors failing her executing a will or settlement disposing of the said fee or capital."

Thirdly, in the event of the marriage being dissolved by the predecease of the husband, and that a child or children of the said marriage be then existing, the trustees shall pay the annual produce of the said estate "to the said Mary Jane Naish

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during her life, for her liferent and alimentary use only; and declaring that in this event also, the same shall not be assignable by her or attachable for her debts or deeds, or the debts or deeds of any future husband she may marry; and after her death the trustees shall pay or apply the whole future interest or annual produce thereof to or for behoof of such child or children during their minorities after their mother's death, and the capital of the shares of the said children, in the said sum of £4000, and their mother's other means and estate foresaid, shall be payable to them after her death, on their respectively reaching majority," &c. "But declaring always, that if such child or children should all die before their mother, or, although they should survive her, should they all die before attaining majority, *and without leaving issue* of their own bodies, then and in that event the said sum of £4000," &c., "shall still continue to be held by the said trustees for the purpose of paying the free interest or annual produce thereof to the said Mary Jane Naish during her life, but for her liferent and alimentary use only, and exclusive always of the jus mariti or right of administration of any future husband the said Mary Jane Naish may marry, and declaring that the same shall not be assignable by her nor be liable to be attached for her debts," &c. "But declaring, nevertheless, that in the event of the said Mary Jane Naish surviving her said intended husband, and of the failure of issue of the said intended marriage, it shall be in the power of the said Mary Jane Naish" "to dispose of by will or other writing the capital or fee of the said sum of £4000," "in any way she may think proper, to take effect after her decease; and the said trustees shall be bound to denude themselves of this trust, and to convey and make over at her death the said estate under their charge to the party or parties in whose favour she may" have left the same; "and failing her leaving any such will or settlement, then the said trustees shall convey the same to her heirs and executors." "But providing and declaring always, notwithstanding anything hereinbefore written, that in the event of the said Mary Jane Naish surviving her said husband, and that whether with or without issue of the marriage existing or surviving, that it shall be in the power of the said trustees, if

they shall be requested by the said Mary Jane Naish, and shall think it for her advantage, but as to which they alone shall be entitled to judge, to make payment to her out of the capital of the estate of a sum not exceeding one-fourth of the probable amount of the trust funds for such purpose, as they may approve of."

Declaring always that while this trust exists the said trustees shall have full power, "with the consent of the spouses or the survivor," "to spend a portion of the capital not exceeding £300 for behoof of the child or children," in business, or provide for a daughter "in marriage," &c.

"Declaring also that, with exception of the power last above given to encroach upon a portion of the capital of their shares, the foresaid provisions for the children of this marriage shall in no case be payable until the first term of Whitsunday or Martinmas after the death of the longest liver of their father or mother, nor whether before or after that period until they respectively attain twenty-one in the case of sons, or in the case of daughters until their attaining that age or being married, nor shall their provisions become vested interests, or be transmissible by them until after the death of the longest liver of their father and mother, and after their respectively attaining majority," &c., "which provision shall be divisible among the children if more than one, as the parents or survivor of them may by any writing under their hand direct, and failing such direction equally among them."

Mrs. Edwardes died on the 10th of June, 1862, survived by her husband and one child, a son, who was stated in the appellants' printed case to have been born on the 7th of October, 1861, and, therefore, after the date of the will of Mrs. Edwardes' mentioned below. The son was married, but had no children. Mrs. Edwardes left a will executed on the 17th of April, 1860, by which she made over to her husband absolutely all her present and future acquired property.

In these circumstances Dr. Edwardes and his son, the respondents, called upon the appellants to denude and pay over to them the trust estate on delivery of a joint discharge.

The appellants refused to close the trust on the grounds that

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they were bound to uphold it for the protection of the husband's alimentary liferent, and, secondly, for the rights of possible grandchildren.

The Lord Ordinary (Kincairney), on the 6th of June, 1890, pronounced judgment in favour of the trustees' contention. The respondents reclaimed, and the First Division (Lord Adam dissenting) recalled the Lord Ordinary's interlocutor and found in favour of the respondents, and ordered the trustees to pay over the fund. Expenses before the Lord Ordinary and First Division were given out of the fund.

On appeal, except as to costs in the Court of Session,

1892. May 9. *Rigby*, Q.C., and *Asher*, Q.C. (with them, *C. Dick Peddie*, both the latter of the Scotch Bar), for the appellants:—

The trustees cannot be required to surrender the trust estate. The father's alimentary provision is not renounceable, nor can he assign or put an end to it: *White's Trustees* v. *Whyte* (1); *Duthie's Trustees* v. *Kinloch* (2). In the same circumstances the wife's life interest, if she had been the survivor, was also made inalienable; so there were parallel clauses shewing the intention.

Secondly, with regard to the son, he took no interest until after the death of the surviving spouse; nor is there any absolute necessity that the fee must ultimately vest in him, for, in construing a marriage contract of this description, which is a family settlement, and in its effect testamentary, the conditio si sine liberis decesserit applies: see Lord Fraser's Husband and Wife, p. 1379, citing *Robertson* v. *Houston* (3) and *Arthur and Seymour* v. *Lamb* (4). And there is no case to the contrary. Here the deed contains an implied gift to the issue of children. In the third paragraph the disposal of the fund is provided for on the child or children "dying without leaving issue," which shews that the parties intended the maxim to apply, their view evidently

(1) 4 Court Sess. Cas. 4th Series (Rettie), 786.

(2) 5 Court Sess. Cas. 4th Series (Rettie), 858.

(3) 20 Court Sess. Cas. 2nd Series (Dunlop), 989.

(4) 8 Court Sess. Cas. 3rd Series (Macpherson), 928.

being that such issue had been referred to by implication in the earlier provision for "children." In support of this view there are, also, in the second paragraph, in connection with the power to put an end to the trust, the words "failure of issue." Therefore, until the death of the liferenter, the husband, the trustees were bound to retain the fund for the protection of the interest of possible grandchildren.

The respondents did not appear.

Judgment after consideration.

HALSBURY, L.C. :—

My Lords, all I desire to say in this case is, that I am quite satisfied, after the argument before your Lordships, that there is no authority in the law of Scotland for any such construction as is insisted on. I have had an opportunity of reading the judgment prepared by my noble and learned friend Lord Watson; I entirely concur in that judgment, and I do not think it necessary to state anything further.

LORD WATSON :—

My Lords, the appellants, as trustees under an ante-nuptial contract between Doctor and Mrs. Edwardes, dated the 20th of February, 1855, hold in trust a sum of £4000, which was settled by the lady's stepfather upon the spouses and their children. The marriage was dissolved by the death of Mrs. Edwardes on the 10th of June, 1862, leaving a son, who was her only child. In this action her husband and son are pursuers, and they conclude for a declaration that the appellants are bound to make payment of the sum in question to them upon receiving their joint discharge. The First Division of the Court, reversing the decision of the Lord Ordinary (Kincairney), has given them decree to that effect. The pursuers have not appeared as respondents in this appeal, which has been heard ex parte. Although your Lordships have not had the advantage of listening to an argument in support of their judgment, the reasoning which prevailed with the three learned judges who constituted the

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majority of the First Division is fully disclosed in the opinions which they delivered.

Under the provisions of the marriage contract, the sole duty of the trustees during the lifetime of both spouses was to pay the income of the fund to Mrs. Edwardes for her personal and alimentary use, exclusive of the jus mariti and right of administration of her husband. Separate directions are given with respect to the disposal of the income and corpus of the fund applicable to the alternative events of the wife or husband predeceasing. In the event of the wife's predecease, leaving a child or children, the trustees are directed to pay the income to the husband during his life, for his alimentary use, his right to assign and the diligence of his creditors being excluded. On his death, the capital is made payable to "the said child or children," after their attaining majority in the case of sons, and in the case of daughters, after their attaining majority or being married. Should there be no child or children alive at the wife's decease, or should they die before the terms at which their provisions become payable, the trustees are directed to make over the capital, at her husband's death, to any person whom she may appoint by will or other writing, whom failing, to her nearest heirs and executors.

Mrs. Edwardes, on the 17th of April, 1860, made a will in favour of her husband, the terms of which are sufficient to carry the capital of the trust fund to him upon the occurrence of the events in which the testatrix had power to dispose of it. Although these events have not occurred, the pursuers maintained, in both Courts below, that they were entitled to present payment upon their joint demand, because the fund, which has not yet vested in either of them, must inevitably belong to one or other of them,—to the son in the event of his surviving his father, and to the father in the event of his son's predecease. If that were an accurate statement of the beneficial interests in the fee of the trust fund which can emerge in any possible event, and there were no obstacle interposed by the terms of the trust, I should be prepared to hold, as I indicated in *Muirhead* v. *Muirhead and Crellin* (1), that they were entitled to immediate pay-

(1) 15 App. Cas. at p. 300.

ment of the fund. But, in my opinion, their right to immediate payment cannot be affirmed if, notwithstanding their ultimate interest, the terms of the trust require that it shall be kept up, or if their right is liable to defeasance by the possible existence of other beneficiaries.

The appellants argued that there are three reasons, each of them in itself sufficient to justify their refusal to pay over the capital of the trust fund to the pursuers. First, that in present circumstances they are bound to retain it for the protection and continuance of the husband's alimentary life-rent; secondly, that in the possible event of the son's death, leaving issue, before his interest becomes vested, such issue will be entitled to take, if they survive their grandfather; and, thirdly, that the will of Mrs. Edwardes in her husband's favour was revoked by the subsequent birth of her son.

Only the first and second of these reasons were pleaded by the appellants in the Court of Session. The Lord Ordinary and Lord Adam, who held that the appellants were under no obligation to denude, rested their judgment upon an affirmance of the second, and expressed no opinion upon the first. The late Lord President (Inglis), who, with Lords McLaren and Kinnear, constituted the majority of the First Division, necessarily dealt with and rejected both these reasons in arriving at the judgment appealed from. The third reason was not submitted by the appellants either to the Lord Ordinary or to the Inner House; and, in my opinion, it ought not to be considered by your Lordships. According to the law of Scotland, the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case. In this case, not only was the point not raised in either Court below, but the record contains no averment to the effect that the younger of the pursuers was born after the date of his mother's will. The allegation of the date of his birth, upon which the plea is founded, was made for the first time in the appellants' case, to which there is no answer; and even there it is stated incidentally, and is not put forward as a reason for denying effect to the will of Mrs. Edwardes.

The learned judges of the Inner House, who decided in favour

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of the pursuers, do not suggest that a trust, duly constituted, for payment of an alimentary annuity, can be brought to an end by the joint action of the annuitant and the parties having beneficial right to the fee. A rule to the contrary has long been settled, and was recently enforced in *White's Trustees* v. *Whyte* (1) and *Duthie's Trustees* v. *Kinloch* (2). In both instances the parties entitled to the fee had a vested interest, which is not the case here; and, in *Duthie's Trustees* v. *Kinloch* (2), the alimentary life-renter and the beneficial fiar were one and the same person. Yet it was held that the combined action of all parties interested could not defeat the settlor's intention to make the annuitant's right alimentary, a result which could not be attained except by continuing the trust. None of their Lordships disputed the existence or force of the rule, but they were of opinion that its application was in this case excluded by the terms of a clause in the marriage settlement, which provides that the trustees shall have power to pay over the capital of the fund "at any time after the death of the predeceasing wife, *and the failure of issue*, on obtaining the consent and discharge of the surviving husband, the life-renter, and the beneficiaries under the wife's will, or settlement, or of her heirs and executors, failing her executing a will or settlement." The view which they took was thus explained by the Lord President: (3) "The only obstacle to the application of this clause is the existence of the other pursuer, Henry Frederick" (that is, of the son). "But the clause just quoted shews that there was no intention to maintain the trust in all events merely for the security of the alimentary life-rent; and if all parties interested,—the surviving husband and the only child,—are desirous to put an end to the trust and obtain a conveyance of the fee, it appears to me that the principle, if not the letter, of the clause is clearly applicable." I find it impossible to concur in that interpretation, which, in my opinion, is as much at variance with the spirit as with the letter of the clause. The clause contains an exception which appears to me to accentuate the expression of the settlor's intention that the trust shall

(1) 4 Court Sess. Cas. 4th Series (Rettie), 786.

(2) 5 Court Sess. Cas. 4th Series (Rettie), 858.

(3) 18 Court Sess. Cas. 4th Series (Rettie), at p. 327.

continue for the purpose of making the husband's life-rent alimentary, in every event save the one specified, namely, the failure of issue of the marriage, and the consequent devolution of the fee to the wife's heirs legal or testamentary. It was the obvious purpose of the settlor to provide that the surviving husband should remain in the enjoyment of a strictly alimentary allowance, so long as there existed children or issue of the marriage whom he was under an obligation to support; and that the trust was not to be terminated until the fee devolved upon persons to whom he owed no such obligation.

The Lord Ordinary held that, by virtue of the implied conditio si sine liberis decesserit, issue of children are conditionally instituted, and that a child of the younger pursuer would take the fee in the event of his father predeceasing the life-renter. When the case went to the First Division, the majority were of opinion that the deed contained expressions sufficient to oust the condition, if otherwise applicable; whilst Lord Adam thought that, irrespective of the condition, its terms were sufficient to give to issue of children, on the failure of their parent before the term of payment, the share of fee which he would have taken on survivance. But all the learned judges of the Division, Lord Adam included, treated it as an open and doubtful question whether the conditio si sine liberis decesserit applies to a provision in a marriage contract. No reason was assigned by any of their Lordships for the doubt which they thus cast upon a principle which I have been accustomed to regard as settled, and I have not been able to discover any foundation for it.

In *Wood* v. *Aitchison* (1), John Aitchison became bound, in the marriage articles of his son Thomas, to invest £400 in land, or on security, and to take the right in favour of the spouses and the longest liver of them in life-rent, "and to the child or children to be procreated betwixt them, whom failing, to the said John Aitchison, his heirs and assignees whatsoever, in fee." The wife predeceased her husband, at whose death there were alive one son of the marriage and the daughter of a predeceasing child. The surviving son claimed the whole provision, but the Court held that the daughter, by virtue of the implied condition,

(1) Mor. Dict. 13,043.

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was entitled to take her parent's share. Their Lordships were unanimously of opinion, "that in all provisions of this sort, the issue of children predeceasing the term of payment were entitled to that share which their parent could have claimed." It would be no light matter to disturb a decision of the Court of Session upon such a point in the year 1789, a decision which must have been relied upon in practice; but, so far as I am aware, during the century which has since elapsed, its authority has never been questioned. It was followed in *Robertson* v. *Houston* (1); and, so late as the year 1870, the First Division, in *Arthur and Seymour* v. *Lamb* (2), upon a case remitted for their opinion, advised the Court of Chancery that a provision by a father in a Scotch contract of marriage, "in favour of himself in life-rent, and to the children of the said intended marriage in fee," did not lapse by the only child of the marriage predeceasing the life-renter, but subsisted in favour of the issue left by that child.

I cannot, therefore, doubt that, according to the law of Scotland, the condition must be read into the provision with which we are dealing, unless its application is expressly or impliedly excluded by the context. The expressions upon which the majority relied as ousting the condition occur in the directions for the disposal of the fee in the event of the husband's predecease. In that case the wife took an alimentary life-rent, the fee being payable on her decease to the "child or children" of the marriage. Then follow declarations to the effect that, "if such child or children should all die before their mother, or although they should survive her, *should they all die without leaving issue of their bodies*," their mother's alimentary annuity was to continue; but that, in the event of "failure of issue," she was to have the power of disposing of the capital by will or other writing, to take effect at her decease. Upon these provisions the Lord President observed: "The contrast between this and the clause applicable to the predecease of the wife is very remarkable. In the latter, the only parties entitled to the fee as institutes are 'children.' In the former, the grandchildren are conditionally instituted to their parents, and the widow's right to test is made dependent,

(1) 20 Court Sess. Cas. 2nd Series (Dunlop), 989.

(2) 8 Court Sess. Cas. 3rd Series Macpherson), 928.

not on the failure of children, but on the failure of issue of the marriage—a term of more elastic signification than 'children,' and including descendants of any generation if the natural meaning is not controlled by the context." His Lordship accordingly came to the conclusion that the settlor, having used different words of gift in the two events contemplated, and having expressly instituted issue of children in the one case, and omitted them in the other, must be held to have done so intentionally. The same reasoning was adopted by Lords McLaren and Kinnear.

I do not think that there exists any such contrast between the two clauses as their Lordships have suggested. In both clauses the words of gift are precisely the same, being to "the child or children of the marriage." The expressions "should they all die before attaining majority, and without leaving issue of their own bodies," are only introduced for the purpose of limiting the wife's power of disposal by will in the event of her surviving her husband. In the event of her predeceasing him, her power appears to me to be subject to the same limitation, because, in that event, it is provided that the trustees may pay to the life-renter, and to her heirs at law, or by will, "at any time after the death of the predeceasing wife, *and the failure of issue*," or, in other words, after the failure of children and their descendants. What might have been the effect of an express gift to children in the one event, and to children and their issue in the other, it is unnecessary for the purposes of this case to determine. In my opinion, these incidental expressions occurring in each clause point in the same direction. They equally indicate the understanding of the settlor that his gift to "a child or children" would bear the meaning which the law ascribes to the words in a marriage contract provision, and would therefore include the issue of such child or children. I am confirmed in that impression by the fact that the two clauses already referred to are followed by provisions applicable to both, in which the beneficiaries are described as "children of the marriage." I can hardly conceive that the settlor meant these words to signify children only in the one clause, and children, whom failing their issue, in the other.

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For these reasons, I have come to the conclusion that the interlocutor of the Inner House, in so far as appealed from, must be reversed, and the interlocutor of the Lord Ordinary restored. Your Lordships are not required to deal with the question of expenses in the Courts below, seeing that there is no appeal from that part of the interlocutor of the First Division which disposes of them. I think the appellants ought to have their costs of this appeal, as between agent and client, out of the trust fund in question.

LORD HERSCHELL :—

My Lords, I have had an opportunity of reading the opinion which has just been delivered by my noble and learned friend Lord Watson. I entirely concur with it, and I have nothing to add.

LORD MACNAGHTEN :—

My Lords, it seems to me that the trustees have done no more than their duty in refusing to hand over the trust funds to Dr. Edwardes and his son. In my opinion they have made good both the grounds on which their refusal was based.

The authorities cited by the learned counsel for the appellants have satisfied me that the trustees were bound to uphold the trust for the purpose of protecting the surviving husband's alimentary life-rent. If I understand aright the opinion of the late Lord President, he would have come to the same conclusion but for a special clause in the settlement, which gives the trustees power to pay over the capital of the trust estate after the wife's death, in the event of failure of issue of the marriage. Whether, even in that case, the trustees would have been bound to denude against their own judgment is perhaps doubtful. It may have been thought that, if there were no issue of the marriage there would be less reason for securing an alimentary provision for the husband, and that in that event the matter might well be left to the discretion of the trustees. But, however that may be, I am unable to assent to the view that, because the trustees are authorized or required to part with the trust funds in one particular case which has not happened, it follows, that in another and a

different case, the Court is at liberty to set aside restrictions which the law allows and the settlement has in terms imposed.

On the second point also I venture to differ from the opinion of the majority of the First Division of the Court of Session. The settlement is not well drawn. But if it is read fairly, it is, I think impossible not to see that it was the intention of the parties to make provision for the issue of children dying in the lifetime of their parents. I doubt whether the word "children" in this settlement of itself and by its own force comprehends "grandchildren." I rather think that the word "children" is used in its proper sense, and so I think is the word "issue." But it seems to me that the settlement is framed upon the view that in calling children the settlors were, at the same time, calling the issue of children. The settlement itself speaks of its provisions as being provisions "for the issue of the marriage." Each purpose of the trust that deals with the interest of children contains somewhere a reference to issue. And the reference, I think, is not the less significant because it is brought in (so to speak) rather casually. In fact, the condition "si sine liberis" seems to run through the whole settlement, and to have been in the contemplation of the parties throughout.

In the result, I think that the interest of possible grandchildren cannot be disregarded.

On both grounds, therefore, I am of opinion that the appeal must be allowed.

LORDS MORRIS and HANNEN concurred.

Ordered in the name of the House of Lords, by the Lords of Appeal sitting in the House of Lords during the dissolution of Parliament, pursuant to the provisions of the Appellate Jurisdiction Act, 1876; that the Interlocutor of the First Division, of the 19th of December, 1890, except so far as aforesaid (namely, as to the expenses) be reversed; further ordered that the Interlocutor of the Lord Ordinary in Scotland of the 6th of June, 1890, be restored; further ordered

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that the appellants do have their costs of this appeal, as between agent and client, out of the said trust funds in the hands of the defenders below (the appellants in this House); and that the cause be remitted to the Court of Session in Scotland.

Lords' Journals, July 25, 1892.

Agents for appellants: *Andrew Beveridge, for Macandrew, Wright, & Murray, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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HERITABLE REVERSIONARY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MILLAR (M'KAY'S TRUSTEE) . . . . . RESPONDENT.

Bankruptcy—Vesting of Heritable Estate in Bankrupt's Trustee—Latent Trust in Bankrupt—Doctrine Tantum et tale—Bankruptcy (Scotland) Act, 1856 (19 & 20 *Vict. c.* 79), *s.* 102.

Heritage was held by a bankrupt on an unqualified ex facie absolute disposition registered in his own name; but it appeared that he held it only as trustee for the right owners, to whom he had given an unrecorded acknowledgment of the trust:—

Held, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 1166), that the heritage did not vest in, or pass to, the bankrupt's trustee for the benefit of general creditors of the bankrupt.

APPEAL from a judgment of the First Division of the Court of Session, Scotland (1), upon a special case.

The Heritable Reversionary Company, the appellants, were the first parties, and Robert Cockburn Millar, the respondent and trustee on the sequestrated estate of Daniel Smith M'Kay, was the second party.

The facts were shortly as follows. The appellant company was incorporated under the Companies Acts in 1880, and its objects were, inter alia, the purchase and holding or reselling of heritable property, these operations being mainly carried on by means

(1) 18 Court Sess. Cas. 4th Series (Rettie), 1166.

of money advanced or lent on deposit by certain shareholders. It may be here mentioned that only eight shares of £5 each were subscribed for, and the company was wound up voluntarily on the 16th of February, 1891, Robert Cockburn Millar being liquidator.

From the formation of the company down to February, 1886, Daniel Smith M'Kay acted as manager. On the 17th of May, 1882, he purchased certain houses in Edinburgh, which were exposed for sale by public roup, at the upset price of £2150. The subjects were conveyed to him by a disposition dated the 16th and 17th of July, 1882, and he was duly infeft by recording the disposition in the appropriate register of sasines on the 14th of September, 1882. The purchase was made by M'Kay for behoof of the appellants, and on the instruction of their directors. The appellants provided £700, and the balance of the price was raised by a bond and disposition in security over the subjects granted by M'Kay.

The appellants were not ex facie the deeds parties to the purchase. On his ceasing to act as manager M'Kay granted a declaration of trust, dated the 17th of May, 1886, in which he stated he held the subjects for the appellants, and bound himself to reconvey them when required. This trust deed was not recorded.

On the 2nd of December, 1890, the estates of M'Kay were sequestrated, and the respondent elected trustee thereof. Thereafter, by consent of all parties, the property was sold for £1815, and the surplus, after paying off M'Kay's bond, lodged in bank to await the decision of the Court.

The main question was whether the respondent, as trustee on M'Kay's sequestrated estates, took these subjects free of the latent trust in favour of the appellants, they being entitled only to rank in the bankruptcy proceedings for the value; or were the appellants entitled to recover the subjects from the respondents as their own property.

On the 14th of July, 1891, the First Division of the Court of Session (Lord M'Laren dissenting) declared that the respondent, the trustee, took the subjects, and that the appellants were only entitled to rank on the sequestrated estate for the value (1).

(1) 18 Court Sess. Cas. 4th Series (Rettie), 1166.

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On appeal,

June 23, 24, 27. *Henry Johnston*, and *H. Goudy* (both of the Scotch Bar), for the appellants:—

It is not denied by the respondent that the heritable property in question belonged beneficially to the appellants. It was purchased on their instructions, de facto possession taken, and they paid all rates and taxes. But the result of the decision appealed from is to distribute among the bankrupt's creditors property which did not belong to the bankrupt. This result is opposed to the broad principles of equity recognised in Scotland. By common law the personal creditors of the bankrupt can only take such property as he held in beneficial right. And the vesting clause sect. 102, of the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), is not inconsistent with the common law. It transfers and vests in the trustee "the whole heritable property *belonging* to the bankrupt"; and, having regard also to clauses 4, 12, 81, and 82, it cannot be inferred that the statute intended to include heritable property of which the bankrupt could not dispose of for his own benefit without committing a fraud. If the property were in England, this judgment would carry such property also; which would be contrary to the law of the situs.

By the common law it has long been settled that, as regards incorporeal personal property—such as shares held under a latent trust—the bankrupt's trustee takes only tantum et tale, or as liable to all equities pleadable against the bankrupt: *Gordon* v. *Cheyne* (1824) (1); *Dingwall* v. *Maccombie* (2).

There is no doubt that onerous assignees are not affected by latent trusts. In *Redfearn* v. *Sommervail* (1813) (3), this House sanctioned the claim of the assignee in an intimated assignation on the ground that he had paid his money on the faith of the cedent being able to give a good title. That case decided that a dishonest trustee could give a valid title to a bonâ fide purchaser; but that was far from deciding that trust property held

(1) 2 Court Sess. Cas. 1st Series (Shaw), (2nd Ed.), 566.
(2) 2 Court Sess. Cas. 1st Series (Shaw), (2nd Ed.), 567, n.
(3) 1 Dow. 50; 5 Pat. App. Cas. 707.

by a bankrupt vested in his trustee. A series of cases follow, applying the doctrine of *Gordon* v. *Cheyne* (1) or *Redfearn* v. *Sommervail* (2), as the circumstances of each suited either case. *Littlejohn* v. *Black* (3) was a case midway between moveable and heritable estate. There the plea of the trustee in bankruptcy, that he was entitled to come in as a new incumbrancer, was not successful; and see Lord Corehouse on the Act 2 & 3 Vict. c. 41 (4). The Acts of 1617 and 1696, c. 4, establishing public registers as the medium by which information could be communicated to purchasers and mortgagees, in no way intended to confer on general creditors the right that an ex facie absolute title should not be burdened with a latent trust.

In *Thomson* v. *Douglas Heron & Co.* (Nov. 15, 1786) (5) Lord Braxfield said: "The case is different as to adjudgers: they are not on the same footing with Mr. Armstrong (the ex facie holder) selling for a price"; and the judgment decided that general creditors must take the right of the debtor "tantum et tale, as it was in his person." Text-writers treat that case as not being a considered judgment; but Lord Braxfield was then in his prime (6), and the Lord Justice Clerk in *Inglis* v. *Mansfield* (1833) (7) supported it, and disposed of the case of *Russell* v. *Creditors of Ross of Kerse* (Jan. 31, 1792) (8), where disparaging remarks upon *Thomson's Case* (5) were made.

The appellants rely on *Thomson's Case* (5) as shewing they have a right to vindicate their title. *Wylie* v. *Duncan* (Dec. 8, 1803) (9) was different, for there the bankrupt was himself the true owner. In *Russell* v. *Creditors of Ross of Kerse* (8) the entail had not been feudalised by sasine, and then came the adjudication by creditors which was completed by infeftment. Also in *Mitchells* v. *Ferguson* (10) there had been a sale, but not completed

(1) 2 Court Sess. Cas. 1st Series (Shaw), (2nd Ed.), 566.

(2) 1 Dow. 50; 5 Pat. App. Cas. 707.

(3) 18 Court Sess. Cas. 2nd Series (Dunlop), 207.

(4) 18 Court Sess. Cas. 2nd Series (Dunlop), 207, at pp. 215, 216.

(5) Hailes' Dec. 1002, at p. 1003; Mor. Dict. 10,229, 10,299; 9 Fac. Coll. 453.

(6) He continued on the Bench until his death in 1799.

(7) 11 Court Sess. Cas. 1st Series (Shaw), 813, at p. 846; 1 Shaw & McL. at p. 282.

(8) Mor. Dict. 10,300.

(9) Mor. Dict. 10,269.

(10) Mor. Dict. 10,296; Hailes' Dec. 879.

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by sasine, and a creditor of the disponer, who had taken infeftment upon an adjudication, was held preferable to the disponee. Lord Kinnear referred to *Calder* v. *Stewart* (1); but Baron Hume's comments refer to onerous purchasers. *Buchan* v. *Farquharson* (2) was quite distinct. There is no means of getting at the reasons for the judgment in *Paul* v. *Jeffrey* (1831–1835) (3). But the doctrine laid down by Lord Westbury in *Fleeming* v. *Howden* (1868) (4) is in the appellants' favour.

[They also cited *Giles* v. *Lindsay* (5), and examined the Bankruptcy Acts of 1772 (12 Geo. 3, c. 72); 1783 (23 Geo. 3, c. 18, preamble and sect. 19); 1793 (33 Geo. 3, c. 74); 1814 (54 Geo. 3, c. 137, sect. 29, the Act in force when Professor Bell wrote his commentaries); 1839 (2 & 3 Vict. c. 41). And *Union Bank of Scotland* v. *National Bank of Scotland*, mentioned by Lord Watson (6).]

J. C. Lorimer, and *William Hunter* (both of the Scotch Bar), for the respondent:—

The decision of the Court of Session is correct. The interpretation clause of the Bankruptcy Act of 1856 defines the words "property" and "estate" as including every kind of property capable of "legal alienation, or of being affected by diligence or attached for debt"; and the vesting section, 102, enacts, that the whole heritable estate belonging to the bankrupt shall vest in his trustee for the benefit of the creditors "to the same effect as if a decree of adjudication in implement of sale as well as a decree of adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee and recorded at the date of the sequestration." Therefore,

(1) Hume's Dec. at pp. 443, 444.

(2) Mor. Dict. 2905.

(3) 10 Court Sess. Cas. 1st Series (Shaw), 75; 12 Court Sess. Cas. 1st Series (Shaw) 718; 1 Shaw & McL. 767.

(4) 6 Court Sess. Cas. 3rd Series (Macpherson) (H.L.), 113, at p. 121; In the Court of Session, 5 Court Sess. Cas. 3rd Series (Macpherson), 658.

(5) 1 Ross. L. C. at pp. 487, 488; 6 Court Sess. Cas. 2nd Series (Dunlop), 771. See also *Campbell* v. *Edderline's Creditors* (January 14, 1801), Mor. App. Voce Adjudication, No. 11; *M'Millan* v. *Campbell* (March 4, 1831, 1834), 9 Court Sess. Cas. 1st Series (Shaw) 551; 7 W. & S. 441.

(6) 13 Court Sess. Cas. 4th Series (Rettie), 380; reversed on appeal, 12 App. Cas. 53.

the test is, what property standing in the bankrupt's name could be alienated by him or carried by an adjudication; and see Lord Kinnear's judgment in the Court of Session in this case, that an adjudger for debt stands in as good a position as an adjudger in implement of a contract of sale. (1) In *Giles* v. *Lindsay* (2) Lord Moncreiff said that it would have made a difference in that case if Brown, the trustee, had become bankrupt. Here, all the appellants had was a personal right of action against the bankrupt to compel him to surrender the estate, which right cannot now be fully enforced, an undue preference obtained after sequestration being null: sect. 111 of the Act of 1856. In *Laurie* *Laurie* (3) Lord Justice-Clerk Hope said: "I am sorry to see this point disturbed at all, or to hear it argued, that a personal contract regarding land, on which nothing has been done can be enforced against parties who have made their rights effectual. . . . By the Sequestration Act (then the 2 & 3 Vict. c. 41) the estate is declared adjudged as at the date of sequestration. How then can it be adjudged in implement against the trustee's statutory right. That right seems to be an effectual bar to the present action; there is no ground for contending that the deed in question was a collusive deed; it is nothing more than a good personal obligation." So also in *Wylie* v. *Duncan* (4) the obligation relied on was considered only personal.

In *Mitchells* v. *Ferguson* (1781) (5) A. purchased a house from B. and entered into possession. A. assigned her disposition to C. without having been infeft. C., likewise, omitted to take infeftment. The house was adjudged by a creditor of B., who was found to have a preferable right to the disposition. *Fleeming* v. *Howden* (6) is distinguishable, for there a feudal right was patent on the records in favour of the claimant. And see Lord Corehouse (7), and Lord Craigie (8), in *Mansfield* v. *Inglis*—citing

(1) 18 Court Sess. Cas. 4th Series (Rettie), at p. 1176.

(2) 1 Ross. L. C. at p. 494; 6 Court Sess. Cas. 2nd Series (Dunlop), at p. 813.

(3) 16 Court Sess. Cas. 2nd Series (Dunlop), at p. 863.

(4) Mor. Dict. 10,269.

(5) Mor. Dict. 10,296; Hailes' Dec. 879.

(6) 5 Court Sess. Cas. 3rd Series (Macpherson), 658; reversed on appeal, 6 Court Sess. Cas. 3rd Series (Macpherson) (H. L.), 113.

(7) 11 Court Sess. Cas. 1st Series (Shaw), at p. 822.

(8) 11 Court Sess. Cas. 1st Series (Shaw), at p. 830.

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Baron Hume's Dictionary of Decisions, tit. Adjudication (1).—that the doctrine of tantum et tale was not the law of Scotland as regards heritable estate in which the bankrupt was infeft. And as to *Gordon* v. *Cheyne*, or rather *Dingwall* v. *Maccombie* (2), the judges there point out that their judgment had no concern with heritable property which was governed by what appeared on the record. Then, from the subsequent report (3) of *Thomson* v. *Douglas Heron & Co.* (1786) (3), it appears that the learned Lords in the earlier report (4) did not intend to lay down the rule in general that adjudgers take the bankrupt's estate tantum et tale; and Institutional writers condemn the tantum et tale doctrine and set up as more correct the decision in *Wylie* v. *Duncan* (1803) (5): see Prof. Bell's Commentaries (ed. M'Laren), p. 301.

With respect to *Paul* v. *Jeffrey* (6) in this House, Lord Adam (7) held it was an authority that a latent trust over heritage did not affect the title of the trustee in bankruptcy: see also the late Lord President Inglis in *Scottish Widows' Fund* v. *Buist* (1876) (8). And a statute was required to apply the rule to corporeal moveables in 1856. (9)

Judgment after consideration.

LORD HERSCHELL:—

My Lords, the question which arises in this case is whether heritable property vested in a bankrupt, which is subject to a latent trust, passes to the trustee in his sequestration free of that latent trust, and is held for distribution amongst the bankrupt's creditors.

The facts may be shortly stated. [His Lordship stated them.]

It seems beyond dispute that as between M'Kay and the appellants he was a bare trustee, and they were the true and

(1) See Hume's Dec. at p. 445.
(2) 2 Court Sess. Cas. 1st Series (Shaw), (2nd Ed.), at p. 569, n.
(3) Mor. Dict. 10,299.
(4) Mor. Dict. 10,229.
(5) Mor. Dict. 10,269.
(6) 1 Shaw & McL. 767; 10 Court Sess. Cas. 1st Series (Shaw), 75; 12 Court Sess. Cas. 1st Series (Shaw), 718.
(7) 18 Court Sess. Cas. 4th Series (Rettie), at p. 1172.
(8) 3 Court Sess. Cas. 4th Series (Rettie), at p. 1082.
(9) 19 & 20 Vict. c. 60; see *M'Bain* v. *Wallace*, 6 App. Cas. 588.

beneficial owners of the property. I do not understand it to be questioned that the law of Scotland recognises such a relationship, or that, if it appeared ex facie of the dispositions, the beneficiary would be regarded as the true owner as against all persons and for all purposes. Although as regards third persons the case may be very different when the trust is latent, I do not see how this can affect the relation of the trustee and beneficiary inter se. If M'Kay had disposed of the property and converted the proceeds to his own use, he would, I apprehend, have been guilty of a breach of trust, and rendered himself amenable to the criminal law. It is true that an onerous purchaser from him would have obtained an unimpeachable title; but this would not be because the property was his, but because the true owners had permitted him to appear on the Register of Sasines as the owner, and thus entitled any one dealing with him for value to regard him as such. A register, whether of heritable or any other subjects, would obviously fail of its purpose unless this were the law. A person intrusted with the custody of a negotiable instrument who has no property in it may equally give a perfect title to an onerous purchaser. I have thought it well to dwell on these considerations, because it appears to me that there has been some confusion between the case of heritable property held upon a latent trust of which the owner appearing on the register is a bare trustee, and that of heritable property as to which the owner has come under some contractual obligation. The latter was the case in *Wylie* v. *Duncan* (1). Archibald was there the owner of the property, not a mere trustee; he had bound himself on certain conditions to re-dispone to Wylie, from whom he took the subjects. But this was a mere personal contract. If he had sold the property and disposed of the proceeds, he might have rendered himself liable to legal proceedings, on the ground that he had put it out of his power to fulfil his obligation; but he would not have been guilty of a breach of trust or brought himself within the reach of the criminal law.

The section of the Bankruptcy (Scotland) Act, which relates to the vesting of the bankrupt's estate in his trustees, is the 102nd. The first part of that section enacts what is to vest in the trustee;

(1) December 8, 1803, Mor. Dict. 10,269.

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the following sub-sections have in view the making that vesting effectual, and accordingly prescribe what is to be the nature and effect of the vesting. The section commences in these terms: "The act and warrant of confirmation in favour of the trustee shall, ipso jure, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors absolutely and irredeemably as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following."

For some reason which is not apparent this part of the section was not alluded to in the Court below, the only words discussed being those which have reference to the effect of the vesting of the heritable estate. But unless any subject be within the words with which the section commences, the remaining provisions of the section become irrelevant. Wherever, therefore, it has to be determined whether heritable or any other estate vested in the trustee, the first question which arises is, Was it "the property of the debtor?" The expression is not a technical one, but is obviously intended to comprise all that would ordinarily be understood as covered by it. It cannot be doubted that it includes all beneficial interests possessed by the bankrupt, even though the property be vested in other persons as trustees for him. On the other hand, I cannot think, unless compelled by authority to take that view, that it includes, or was ever intended to include, estates of which the bankrupt was a bare trustee, and in which he had no beneficial interest.

The 2nd sub-section, which was so much discussed in the Court below, and which only applies, as I have pointed out, to that which comes within the description "property of the debtor," itself commences with these words: "The whole heritable estate *belonging to* the bankrupt in Scotland to the same effect," &c. The words "belonging to" are not technical; and I do not think that a heritable estate of which the bankrupt is a bare trustee and in which he has no beneficial interest can with any propriety be said to "belong" to him.

It was indeed suggested, and the view found some favour in the Court below, that the trustee in the sequestration was to be regarded as an onerous and bonâ fide alienee from the bankrupt.

I am unable to accede to this view. I do not think that he is an onerous alienee within the principle which renders the title of such a person valid even though it be obtained from a bare trustee in fraud of the beneficial owner. That he is not such an alienee appears to me to be well established in the law of Scotland as regards property other than heritable, and I fail to see any ground for a distinction in this respect between heritable and other descriptions of property.

It is to be observed that the Bankruptcy Act of 1783 required the bankrupt, under the penalty of imprisonment, to make over to the trustee "his whole real and personal estate wherever situated." There were corresponding provisions in the Acts of 1793 and 1814. I cannot think that it was the intention of the legislature to compel a bankrupt to convey to his trustee, for the benefit of his creditors, property which he could not dispose of to any creditor at the time of sequestration without being guilty of a criminal breach of trust. The Act of 1839, which preceded the one now in force, vested in the trustee the heritable estates "*belonging to* the bankrupt in Scotland." I have already commented on these words in connection with their use in the present Act.

The only case which, to my mind, can even plausibly be said to be inconsistent with the view I take of the statutes, is the case of *Jeffrey* v. *Paul* (1) in this House. Lord Brougham, in pronouncing his decision, assigned no reasons for the conclusion at which he had arrived. It can therefore only be said to be an authority for the proposition contended for by the respondent, if no other ground for the judgment is reasonably conceivable. The circumstances of that case were peculiar. It was a contest between two trustees and the representative of a third who had become bankrupt. All the trustees had made advances to the trust estate, and one contention put forward on behalf of the trustee in the sequestration was that the bond which was then in question had, by reason of the advances they had made, been held by the three trustees in equal shares in their own right, and not on behalf of their trust. Whether this was the ground of Lord Brougham's judgment it is impossible to say; but I

(1) 1 Shaw & McL. 767.

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think it much more likely that it was than that he should have determined, without statement made or reason given, the important principle contended for, affecting as it does so seriously rights of property, and being applicable to every sequestration which should thereafter occur in Scotland.

For these reasons I am of opinion that the interlocutor appealed from should be reversed, that it should be declared that the subjects in question did not pass to the respondent, and that the appellants, as beneficial owners, are entitled to the sum consigned in bank, and that the respondent do pay the costs of this appeal.

LORD WATSON:—

My Lords, the facts giving rise to the question of law involved in this appeal are fully set forth in a special case submitted by the parties for the opinion of the First Division of the Court of Session, and so far as material may be shortly stated.

The appellants in May, 1882, purchased through Daniel Smith M'Kay, who was at that time their manager, certain heritable subjects in Edinburgh at the price of £2150. The disposition, which is absolute and unqualified in its terms, was taken to M'Kay as an individual, and was recorded by him in the appropriate Register of Sasines on the 14th of September, 1882. Part of the price was obtained by his granting a bond and disposition in security over the subjects for a loan of £1450, which was recorded in the Register of Sasines of the same date with the disposition, and the balance was provided by the appellants. M'Kay ceased to be their manager in February, 1886, and on the 17th of May, 1886, he executed in their favour a formal back bond, or declaration of trust, by which he acknowledged that he was vested with the subjects in trust only for behoof of the appellants, and undertook that, whenever required to do so, he would subscribe and deliver a formal and valid conveyance in favour of any person or persons whom they might name.

The appellants neither recorded their back bond nor required M'Kay to denude; and the feudal title to the subjects continued to stand in his name as absolute proprietor until the 2nd of

December, 1890, when his estates were sequestrated in terms of the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79). The respondent was duly appointed trustee in the sequestration, and in that capacity he asserts his right to hold and realize the subjects as part of the bankrupt's heritable estate, for behoof of his creditors, leaving the appellants to rank for a dividend, as personal creditors in respect of their beneficial interest. The appellants, on the other hand, maintain that the subjects did not form part of the bankrupt's estate within the meaning of the Act, and did not pass to the respondent as trustee in the sequestration.

The subjects were sold in March, 1891, with the consent of both parties and under reservation of their respective claims. After paying the heritable bond with interest and the expenses of sale, there remained a balance of £365, which was consigned in bank to abide the issue of this litigation.

By the interlocutor appealed from the majority of the First Division, consisting of the late Lord President Inglis, with Lords Adam and Kinnear, declared that the respondent, as trustee on M'Kay's sequestrated estate, took the subjects in question, which were vested absolutely in the bankrupt, free of the latent trust in favour of the appellants; and that the appellants are only entitled to rank on the sequestrated estate for the value of the subjects, and are not entitled to recover the same from the respondent as their own property. In pursuance of that declaration their Lordships found that the consigned money belongs to the respondent. From that judgment Lord M'Laren, the only other member of the Court, strongly dissented.

It is sufficiently obvious that the controversy between these parties must depend upon the terms in which the right of the trustee in a sequestration is defined by the Act of 1856. Before adverting to the language of the statute, I think it may be useful to consider the nature of the relations existing between a solvent trustee who is feudally vested in the heritable estate of the trust by a title ex facie absolute, and his cestui que trust, whose right rests upon a latent back bond. As between them there can, in my opinion, be no doubt that according to the law of Scotland the one, though possessed of the legal title and

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being the apparent owner, is in reality a bare trustee; and that the other, to whom the whole beneficial interest belongs, is the true owner. Upon that point the opinions expressed by noble and learned Lords in *Union Bank of Scotland* v. *National Bank of Scotland* (1), and by those learned judges of the Court of Session, with whom their Lordships in that case agreed, appear to me to be conclusive. But in that state of the title the trustee, though his action may be in breach of duty, or even grossly fraudulent, can communicate a valid right to a purchaser, or a lender on the security of the trust estate who transacts with him for value, and without notice of the interest of the beneficiary.

That rule, which alike applies to moveable and heritable estate, was finally settled in the law of Scotland by the judgment of this House in *Redfearn* v. *Sommervail* (2), an authority which seems to have been regarded by the Lord President as practically decisive of the present case. It must, however, be kept in view that the validity of a right acquired in such circumstances by a bonâ fide disponee for value does not rest upon the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the indicia of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee.

It is also necessary to keep in view that the rule of personal bar which thus protects transactions with the trustee from challenge by the cestui que trust, only applies to transactions which affect and create an interest in the trust estate. Personal creditors of the trustee, who neither stipulate for nor obtain any conveyance to that estate, do not, in the sense of law, transact on the faith of its being the property of the trustee. As Lord M'Laren observed in this case (3): "Creditors in general do not give credit to a bankrupt in reliance upon any supposed presumption that property standing in his name is his private

(1) 12 App. Cas. 53. (2) 1 Dow. 50; 5 Pat. App. Cas. 707.
(3) 18 Court Sess. Cas. 4th Series (Rettie), at p. 1175.

property. Unless they are going to advance money on the heritable security, they know nothing of his title-deeds and trust only to his personal credit." Accordingly, the contraction of debts by the trustee, whilst the trust is latent, creates no nexus over the trust estate in favour of personal creditors. If they proceeded to attach the trust estate on the footing of its belonging to their debtor, the beneficiary could defeat their diligence by appearing to vindicate his right. An adjudging creditor gives no new consideration for the interest in the estate which he secures by the process of adjudication; and, in my opinion, he can be in no better position, in a question with the cestui que trust, than if he had obtained a conveyance without value from the trustee. That appears to me to have been the ratio of the decision in *Thomson* v. *Douglas Heron and Company*, which is reported in Morison's Dictionary (1), and also by Lord Hailes (2). In that case Thomson disposed his lands to his agent, Armstrong, "in order that he might sell the same and apply the proceeds for behoof of Thomson." In making up a title by charter of resignation Armstrong omitted these words from the procuratory, so that the qualification of his right did not appear on the record. He then, instead of selling, borrowed money for his own purposes from Douglas Heron & Co., and conveyed the lands to them in security of the debt; and subsequently some of his general creditors obtained decrees of adjudication, upon which they were not infeft. Thomson brought a reduction of Armstrong's title, and of these rights flowing from him, upon the allegation of Armstrong's fraud; and the Court found "that the allegation of fraud was not relevant against the heritable securities and infeftments, but that it was relevant as to the creditors—adjudgers." The report in Morison, which is taken from the Faculty Collection, contains certain observations which are said to have been made by the Bench; but Lord Hailes, who was himself a party to the decision, has noted the opinions delivered by the Lord Justice Clerk, Braxfield, and by Lord Monboddo, as containing what he at the time understood to be the grounds upon which it proceeded. Lord Braxfield, than whom there is no higher authority in this department of the

(1) November 15, 1786, Mor. Dict. 10,229. (2) Hailes' Dec. 1002.

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law, said: "I think that Mr. Armstrong might have sold for a price, and the purchaser would have been secured by his bona fides. The same is the case as to heritable creditors. The case is different as to adjudgers. They are not on the same footing with Mr. Armstrong selling for a price." The same distinction based upon the obvious fact that the heritable creditor does, and the adjudging creditor does not, give value for the interest which he takes in the land, is thus tersely stated by Lord Monboddo: "An heritable bond is good because it is the price of the estate; the adjudger seeks to mend his former security."

It was argued for the respondent, on the strength of some dicta by institutional writers, that *Thomson* v. *Douglas Heron and Company* (1) was overruled in the subsequent case of *Russell* v. *Ross's Creditors* (2); but the argument, when examined, is really destitute of foundation. Among the observations attributed to the Bench in Morison's report of the earlier case, is one to the effect that the adjudging creditors "must take the right of their debtor tantum et tale, as it was in his person." A second and brief report of the same case in Morison's Dictionary (3) bears that "the Court did not mean to lay down the rule in general that adjudgers must take tantum et tale;" and the same remark was made by the Court in *Russell* v. *Ross's Creditors* (2). What appears to me to have been decided in *Thomson* v. *Douglas Heron and Company* (1) was, that creditors who have given no value for the right cannot carry off from the true owner property standing in the name of their debtor, in which he has no beneficial interest—a decision perfectly sound in principle. In *Russell* v. *Ross's Creditors* (2), there was no question of trust; and it was sought, unsuccessfully, to apply the doctrine of tantum et tale to creditors who had completed a feudal title by adjudication to lands of which their debtor was the beneficial owner, in competition with others who had prior but merely personal rights to demand a conveyance from him. I do not doubt that, in such circumstances, the doctrine of tantum et tale has

(1) Mor. Dict. 10,229; 10,299; 9 Fac. Coll. 453; Hailes' Dec. 1002.

(2) January 31, 1792, Mor. Dict. 10,300.

(3) Mor. Dict. 10,299.

no application. It was rejected by the Court of Session in *Mitchells* v. *Ferguson* (1); *Wylie* v. *Duncan* (2); and in *Mansfield* v. *Walker and Others* (3), which was appealed to this House, and there affirmed (4), upon the special ground that the bond of corroboration upon which the appellant relied was granted by the bankrupt after he had been divested of his estates through the operation of the Act 54 Geo. 3, c. 137. These authorities were brought fully under your Lordships' notice by counsel; but, in my opinion, they have little, if any, bearing upon the point which your Lordships have to decide, because in all of them the competition related, not to estate held by the bankrupt under a bare trust, but to estate of which he was the beneficial proprietor.

I agree with the late Lord President in thinking that the opinions expressed by Lord Westbury in *Fleeming* v. *Howden* (5), with reference to the nature of the interest which a trustee in sequestration takes in the heritable estate of the bankrupt, require considerable modification. They were strictly obiter, because in that case the clause of devolution upon which the successful claim of the heir-substitute depended, whether it be regarded as constituting a trust in the bankrupt or a qualification of his right, was apparent upon the face of his recorded title.

But these considerations as to preferences between the trustee and a creditor, and as to the doctrine of tantum et tale, when the subject of competition is the undoubted property of the bankrupt, are, in my opinion, of very secondary importance in this case. It does not admit of dispute that all property, whether heritable or moveable, in which the bankrupt has a beneficial interest, whether the title be in him or in a trustee for him, to the extent of that interest, passes to and vests in the trustee in his sequestration, under the Act of 1856, which also makes provision for the extent and effect to which it shall vest in the trustee, as in a question with creditors having claims upon it.

(1) Feb. 13, 1781, Mor. Dict. 10,296.
(2) December 8, 1803, Mor. Dict. 10,269.
(3) 11 Court Sess. Cas. 1st Series (Shaw), 813.
(4) 1 Shaw & M'L. Ap. Ca. 203.
(5) 6 Court Sess. Cas. 3rd Series (Macpherson) (H. L.), 121.

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What shall vest, and what shall be the effect of vesting, are two different things, and they are separately dealt with in the statute. In my opinion two questions arise in this case upon the Act of 1856: First, do the subjects in question fall within the statutory definition of property which passes to the trustee for behoof of the bankrupt's creditors? Secondly, if they do, what is the right of the appellants as against the respondent? It is manifestly idle to consider what may be the effect of these subjects vesting in the respondent until it has been shewn that they did vest in him. Yet the learned judges of the First Division seem to have confined their attention to the second of these questions. They all refer to and discuss the enactments relating to the effect of vesting, and they take no notice of the statutory definition of the property which is to vest.

Sect. 102 of the Bankruptcy (Scotland) Act contains the whole of its provisions which deal expressly with the vesting of the bankrupt's estates in his trustee and its effect. The structure of the clause is worthy of observation. It first of all prescribes what property is to vest in the trustee, and then goes on to define, in three sub-sections, to what effect (1.) moveable estate and effects wherever situated, (2.) heritable estate in Scotland, and (3.) heritable estate in England, Ireland, or any of Her Majesty's dominions, are to become vested in him. Omitting the sub-sections, clause 102 is in these terms: "The act and warrant of confirmation in favour of the trustee shall, ipso jure, transfer to and vest in him or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, *the whole property of the debtor*, to the effect following."

Were the subjects in dispute the property of M'Kay, within the meaning of that enactment, at the date of his sequestration? Upon the language of the statute, that appears to me to be a very simple question, admitting only of a negative answer. An apparent title to land or personal estate, carrying no real right of property with it, does not, in the ordinary or in any true legal sense, make such land or personal estate the property of the person who holds the title. That which, in legal as well as in conventional language, is described as a man's property is estate,

whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud. It is true that the law will sustain a right created by his fraudulent alienation in the person of a bonâ fide alienee for value, but not, as has been already pointed out, upon the ground that the thing alienated was the property of his author. The respondent, as representing creditors who had no dealings with the bankrupt in relation to the estate of which the appellants had the beneficial fee, and who have given no value for the interest which he claims on their behalf, does not stand in the position of an onerous and bonâ fide alienee, and cannot take benefit from the principle which validates the right of the latter.

I am confirmed in these views by a reference to previous statutes regulating the process of sequestration in Scotland, of which there were no less than five prior to the consolidating Act of 1856. The first of them (12 Geo. 3, c. 72), passed in 1772, only applied to the personal estate of the debtor; but the next and all subsequent Acts embrace his heritable as well as his personal estate, making them a common fund for distribution among his creditors, according to their respective rights and preferences. The object of the progressive legislation, which has culminated in the Act of 1856, has not been to alter or extend the definition of the bankrupt's property available for distribution, but to simplify procedure, and to put an end to the possibility of individual creditors obtaining preferable securities over the estate, after sequestration, by giving the trustee, when appointed, a complete and absolute title as at its date.

The Act 23 Geo. 3, c. 18, the first which brought real estate within the scope of the sequestration, by sect. 19, made it incumbent on the bankrupt, when ordered by the Court, to execute a disposition or dispositions making over to the trustee and his successors in that office "his whole real and personal estate, wherever situated." In the event of his refusal to convey, the Court was authorized to punish the bankrupt by imprisonment, and, if necessary, to issue a decree finding "the property of the whole sequestrated estate and effects real and personal" to be in

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the trustee, and adjudging to him the whole lands and heritable estate within its jurisdiction. These provisions were in substance re-enacted by the 23rd section of 33 Geo. 3, c. 74, in which the property which the bankrupt was bound to convey under pain of imprisonment is described as "his whole estate and effects heritable and moveable, real and personal, wherever situated." Similar provisions were made for vesting the sequestrated estate in the trustee by sect. 29 of the Act 54 Geo. 3, c. 137, which describes the property to be conveyed to him by the bankrupt in the same terms with the preceding statute of 1793. In 1839 the Act 2 & 3 Vict. c. 41, the immediate predecessor of the Act of 1856, by sect. 79, vested directly in the trustee, by force of statute, and without the intervention either of the bankrupt himself or of the Court, the whole heritable estates "belonging to the bankrupt in Scotland."

I venture to think that the property described in these four Acts as falling within the sequestration includes no heritable or other estate of which the bankrupt was not the true owner. That construction gives effect to the literal meaning of their language; and it is, to my mind, hardly conceivable that the legislature should have intended to confiscate the property of persons other than the bankrupt for the behoof of his creditors, by requiring him to execute a disposition in favour of the trustee, which, but for the statute, he could not have granted, without being guilty of the crime of breach of trust and embezzlement. I can find nothing in these statutes which lends countenance to the suggestion that the legislature meant to compel any such fraudulent proceeding.

The principle which ought to govern the decision of this case was, in my opinion, rightly understood and applied by the Court of Session in *Gordon* v. *Cheyne* (1), and a case of earlier date, *Dingwall* v. *Maccombie* (2). There is not a report of the opinions, if any, delivered in *Gordon* v. *Cheyne* (1); but *Maccombie's Case* is reported in a footnote (2), together with the opinions of the judges by whom it was decided. The same point was raised in each of these cases. In *Dingwall* v. *Maccombie* (2) the debtor was ex facie absolute proprietor of two

(1) 2 Court Sess. Cas. 1st Series (Shaw), (2nd ed.), 566.

(2) 2 Court Sess. Cas. 1st Series (Shaw), (2nd ed.), 567, n.

shares of the Aberdeen Shipping Company, which he held in trust for Dingwall; and the trust being still latent, he being at the time insolvent, conveyed these shares to Maccombie for behoof of his creditors. In *Gordon* v. *Cheyne* (1), the bankrupt at the date of his sequestration held one share in the same company, as absolute proprietor under a latent trust for Gordon, the true owner. Accordingly, the competition in both cases lay between the true owner and a trustee for creditors, the only difference being that in the one the trustee had a legal, and in the other a voluntary, disposition of the whole property belonging to the insolvent. The Court in both decided in favour of the cestui que trust; and their decisions have since been accepted as conclusively settling that incorporeal personal rights, affected by a latent trust, though vested in the bankrupt by a title ex facie absolute, do not pass to the trustee in his sequestration.

The decision of this House in *Redfearn* v. *Sommervail* (2), which appeared to one learned judge to be conclusive against the appellant, related to an incorporeal moveable right, being a share in a private trading society. If that decision were adverse to the appellant's claim, it would à fortiori be fatal to the authority of *Dingwall* v. *Maccombie* (3) and *Gordon* v. *Cheyne* (1). The rule followed by the House in *Redfearn* v. *Sommervail* (2) does not conflict with these cases, which decide, in my opinion rightly, that a trustee for general creditors, whether by voluntary conveyance from the bankrupt or taking right under the Sequestration Acts, cannot plead the equities competent to a person who has acquired an interest in the trust property from the bankrupt in bonâ fide and for onerous cause. And so far as concerns the right of the trustee in sequestration, I am unable to discover any ground, either in common sense or in legal principle, for making a distinction between heritable and moveable rights vested in the bankrupt subject to a latent trust, and for holding that the heritable right is, and that the moveable right is not, carried by the sequestration.

Lord Adam and also Lord Kinnear appear to have held that

(1) 2 Court Sess. Cas. 1st Series (Shaw), (2nd ed.), 566.

(2) 1 Dow. 50; 5 Pat. App. Cas. 707.

(3) 2 Court Sess. Cas. 1st Series (Shaw), (2nd ed.), 567, n.

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the present question was concluded by the decisions of the Court of Session in *Wylie* v. *Duncan* (1), and of this House in *Jeffrey* v. *Paul* (2); but I venture to think that their opinion is based upon a misapprehension of what was really decided in these cases.

I have already stated what I believe to have been the import of the judgment in *Wylie* v. *Duncan* (1) and similar cases; and I have only to remark further, that a personal obligation to convey heritable estate, undertaken by one who is the beneficial as well as the feudal owner, does not, according to the law of Scotland, denude him of his beneficial interest, or confer upon the person to whom it was contracted either the character or the rights of a trust beneficiary.

The case of *Jeffrey* v. *Paul* (2) was very special in its circumstances. Harley, an insolvent, compounded with his creditors, and, in order to secure the cautioners for his composition, conveyed certain heritable subjects belonging to him, to himself and them, in trust, with power to sell or burden, for repayment of any advances made by them on his behalf, and for payment of any balance remaining to himself, his heirs, or disponees. The trustees sold part of the subjects, and took from the purchaser a heritable bond and disposition in security for £400 payable to three of their number, Cook, Cuthill, and Paul, as individuals. Cuthill became bankrupt at a time when the sums advanced and liabilities incurred by the cautioners exceeded the value of the trust estate. Jeffrey, as trustee in Cuthill's sequestration, claimed one-third of the sum contained in the bond as belonging to the bankrupt, and was opposed by the solvent cautioners, who maintained that the bond was trust property. The Court of Session rejected Jeffrey's claim; but on appeal to this House it was sustained. The report in the Court of Session (3) assigns no reasons for the judgment; and, in this House, Lord Brougham, sitting alone, moved its reversal without explanation or comment. In these circumstances, I find it impossible to regard the judgment of that noble and learned Lord as a decision upon the point raised in this appeal. The pleadings of the appellant in

(1) December 8, 1803, Mor. Dict. 10,269. (2) 1 Shaw & McL. 767.
(3) 12 Court Sess. Cas. 1st Series (Shaw), 718.

this House disclose that he claimed a third share of the bond on the footing that the bond by its terms was equivalent to a payment in cash by the trust to Cook, Paul, and the bankrupt, and, in my opinion, it is exceedingly probable that the case was decided in his favour upon that view. At all events, the decision cannot be regarded as establishing the rule that a trustee in sequestration takes by force of statute property vested in the bankrupt subject to a latent trust.

For these reasons, I concur in the judgment which has been moved by the noble and learned Lord on the Woolsack.

LORD MACNAGHTEN :—

My Lords, if this House were compelled to uphold the decision under appeal, I rather think I should be inclined to doubt whether the law of bankruptcy in Scotland was in a condition altogether satisfactory.

One M'Kay, a bankrupt, at the time of his bankruptcy stood infeft in certain heritable estates, consisting of houses in Edinburgh, on a title upon the face of it absolute and unqualified. M'Kay had been the manager of the appellant company. The houses in question had been bought by him for and on behalf of his employers; the purchase-money, so far as any money passed, was paid by them. But for the sake of convenience the company took the conveyance in the name of their manager. Some years afterwards, M'Kay left the company's employment, and then he executed a declaration in writing in which he confessed and declared that he held the premises "in trust only for behoof of the company," and undertook on request to transfer the trust property according to their directions. No transfer, however, was executed, nor was the declaration of trust registered. So there was nothing in the public records at the time of the bankruptcy to shew that the bankrupt was not the real and true owner. In this state of things the First Division of the Court of Session (Lord M'Laren dissenting) has held that these houses form part of the bankrupt's sequestered estate applicable to the payment of his debts, and that the company, for whom he declared himself trustee, can only claim in the bankruptcy for the value of the property.

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Is that decision right? It was argued that the question depends upon the feudal law of Scotland and upon certain provisions of the Bankruptcy Act of 1856. I venture to think that it turns wholly upon the language of the Act, and that a decision in favour of the company would not in the slightest degree trench upon the principles of the feudal law.

Under the Act of 1856, proceedings in bankruptcy are commenced by a petition for sequestration. If the case is within the Act the Lord Ordinary or the sheriff is directed to issue a deliverance awarding "sequestration of the estates which then belong or shall thereafter belong" to the bankrupt before the date of his discharge, and declaring the estates "to belong to the creditors" for the purposes of the Act. A trustee is to be elected by the creditors. On the election being confirmed the sheriff clerk is directed to issue an "act and warrant" in a prescribed form; and it is provided that such act and warrant shall be evidence of the trustee's right and title to the sequestered estate for the purposes of the Act. The bankrupt is required to make up and deliver a "state of his affairs specifying his whole property," and also "a rental of his heritable property." It is provided by sect. 102 that "the act and warrant of confirmation in favour of the trustee shall ipso jure transfer to and vest in him or any succeeding trustee for behoof of the creditors absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following." Then follow three sub-sections. The last deals with the bankrupt's real estate out of Scotland, but within Her Majesty's dominions. The first is concerned with the effect of the vesting as regards the moveable estate and effects of the bankrupt wherever situated. It is admitted that with regard to moveable estate the only property which passes to the trustee is property of which the bankrupt was the true owner. The doctrine of reputed ownership, at least as regards moveable property, has no place in the bankruptcy law of Scotland. The 2nd subsection on which the opinions of the First Division are founded deals with the effect of the vesting as regards "the whole heritable estate belonging to the bankrupt in Scotland." It declares that the vesting is to be "to the same effect as if a decree of

adjudication in implement of sale as well as a decree for adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee and recorded at the date of the sequestration."

Such being the main provisions of the Act of 1856, I cannot help thinking that the learned judges who formed the majority of the First Division have dwelt too much upon the effect of the vesting, and that they have paid too little attention to the thing which is vested. The vesting is absolute. It strips the bankrupt of every shred of interest. But what is the thing which is vested? It is "the property" of the bankrupt. As regards his real estate in Scotland it is "the heritable estate belonging to him." The words "property" and "belonging to" are not technical words in the law of Scotland. They are to be understood, I think, in their ordinary signification. They are in fact convertible terms; you can hardly explain the one except by using the other. A man's property is that which is his own, that which belongs to him. What belongs to him is his property. No one in ordinary parlance would speak of land or funds held only in trust for another as the property of the trustee. Land or funds so held are not the trustee's property in any real sense any more than a bankrupt's sequestered estate is the property of the trustee in bankruptcy. It is true that in the present case the complete feudal title was in the bankrupt. It is true that in a strict legal view the right of the beneficiaries was only a personal claim against the trustee. But for all that the bankrupt could not have applied the property to his own purposes or used it for his own benefit without committing a fraud for which he might have been made criminally responsible. The beneficiaries were the true owners all along. The bankrupt, though he had the feudal title, though he might have made a perfectly good title to a person dealing with him on the faith of the register without notice of the trust, was in reality only nominal owner without any property or proprietary right. It seems to me that in bankruptcy, by the very terms of the Bankruptcy Act, the Court is bound to look, not to the form of the feudal title, but to that which Lord Justice-Clerk Hope, in contrast to the feudal or "nominal" title as he terms it, described in one case as "the

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substance and reality of the right of property": *Giles* v. *Lindsay* (1).

My Lords, I think it would be idle for me to refer to the authorities which have been so fully explained by my noble and learned friend Lord Watson. I am satisfied that there is nothing in any one of the cases which conflicts with the view which has been presented to your Lordships. And I entirely concur in the motion that the interlocutor under appeal should be reversed with costs.

LORD FIELD:—

My Lords, the only question in this appeal is whether the net proceeds of the heritable estate in question belong to the appellants or to the respondent, and the answer to the question depends upon the construction which your Lordships ought to place upon the 102nd section of the Bankruptcy (Scotland) Act of 1856.

By that section there is undoubtedly transferred to and vested in the respondent for and on behalf of the creditors of the bankrupt, amongst other subjects, his whole "property with all rights, title, and interest in his whole heritable estate in Scotland."

Now the subjects in question are heritable estates in Scotland and in one somewhat limited sense might be understood, as it was contended for the respondent they ought to be, as the property of the bankrupt. He was ex facie the disponee of them; he was the only recorded owner of them known to the public, he was so recorded as absolute owner and without mention of any trust or limitation, and they were feudally vested in him. Lastly his disposition of them, although fraudulent and dishonest on his part, would have passed the property to an onerous disponee without notice.

In a larger and broader sense, however, they were not his. The consideration for the disposition to him was provided by the appellants, and the bankrupt only took and was recorded as owner for their convenience for whom he has always held them as a trustee.

Now it is clear from the authorities referred to by my noble

(1) Ross. L. C. at p. 491.

and learned friends that the law of Scotland recognises as property the beneficial as distinct from the legal interest in the subject, so that if the two interests, the legal on the one hand and the whole beneficial interest on the other, are vested in different persons, the apparent owner who has only the legal title is, as between him and the beneficial owner, a bare trustee, and the cestui que trust is the true and real owner.

In this state of the law, therefore, the language of the section is capable of two possible constructions; and it is a sound and well-known rule of construction of a statute that if there are two constructions one of which will do great and unnecessary injustice, and the other will avoid that injustice and keep exactly within the purpose and objects for which the statute was passed, it is the bounden duty of a Court to adopt the second and not the first of those constructions, per Cairns, L.C., in construing the analogous English Bankruptcy Act in the case of *East and West India Dock Company* v. *Hill* (1), and adopted by the Judicial Committee in the case of an Insolvent Act of the Victoria Legislature in *Railton* v. *Wood* (2). This rule does not depend upon any principle or authority peculiar to the English law, but may safely be applied to the construction of an analogous statute forming part of the law of Scotland.

In which, therefore, of these two senses is the language of the Act now in question to be understood? It is, like all bankruptcy or insolvent statutes, a "special law having for its object the distribution of the debtor's estate equitably amongst his creditors": per James, L.J., in *Ex parte Waller* (3). It is the debtor's estate and not the estate of any third person which it is the purpose and object of the statute to distribute amongst the creditors of the bankrupt, in satisfaction of his debts. It is not that of anybody else who is not within the purview of the statute.

The effect of the construction contended for by the respondent, and adopted by the majority of the Court below, would be the distribution, not of the bankrupt's estate, which his creditors might have rendered liable to the payment of their debts, or which he might honestly and without fraud have parted with to

(1) 9 App. Cas. at p. 456. (2) 15 App. Cas. 363.
(3) 17 Ch. D. at p. 756.

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them in satisfaction of them, but of the property of the cestui que trust, to which the trustee could only have created a title in a third person by fraud, and which his personal creditors could not have in any way attached or rendered liable to the payment of their debts.

This construction would involve the great injustice of applying one man's property in satisfaction of another man's debt. Whereas the other construction is free from any such injustice and is quite consistent with the fair object of the Act, which is to free the bankrupt from liability upon taking from him and giving to his creditors everything which might have been rendered available for the payment of their debts.

The only possible injustice which such a construction might give rise to would be in the case of any creditor who had given credit to the bankrupt upon the faith of the apparent title vested ex facie in the bankrupt; but, as my noble and learned friends Lord Watson and Lord M'Laren in the Court of Session have both conclusively dealt with that point, I will only add that in other bankruptcy statutes reputed ownership clauses have been expressly made part of the scheme of distribution in order to deal with that possible evil in the case of moveables, but have not, that I am aware of, extended the provision to heritable estate. It seems to me, therefore, that heritable subjects, of which the bankrupt is a bare trustee, do not pass by the warrant of confirmation.

I have thus far dealt with the case solely upon general principles of construction, and have not adverted to the numerous authorities cited at the bar, and commented upon by the Lords of Session in their various judgments. It has been my duty to examine them; but my noble and learned friends have so fully placed them before your Lordships, and commented upon them so exhaustively, that it is quite unnecessary for me to say more than that I concur in the view taken of them by them and by Lord M'Laren, who dissented from the interlocutor appealed from. I concur in the motion proposed by your Lordships.

Ordered and Adjudged, by the Lords Spiritual and Temporal, in the Court of Parliament of Her

Majesty the Queen assembled, That the Interlocutor of the 14th of July, 1891, complained of, be Reversed: And it is declared that the subjects in question did not pass to the Respondent, and that the Appellants, as beneficial owners, are entitled to the sum consigned in Bank: Further ordered, That the said Cause be remitted to the Court of Session in Scotland, to do therein as shall be just and consistent with this Declaration and Judgment: Further ordered, That the Respondent do pay or cause to be paid to the Appellants the Costs incurred in respect of the Appeal to this House.

Lords' Journals 9th Aug. 1892.

Agent for appellants: *Andrew Beveridge, for Watt & Anderson, S.S.C., Edinburgh.*

Agents for the respondent: *Keeping & Gloag, for Morton, Smart, & Macdonald, W.S., Edinburgh.*

[HOUSE OF LORDS.]

SIR FREDERIC JOHN WILLIAM JOHNSTONE OF WESTERHALL, BARONET . } APPELLANT;

AND

THE DUKE OF BUCCLEUCH AND QUEENSBERRY, K.G. . . . . } RESPONDENT.

Scotch Law—Superior and Vassal—Whether Composition or Relief payable by the Vassal on Entry—Entry by Trustees—Effect of Confirmation of prior Infeftments by Superior.

An ancestor of the appellant acquired three several parcels of land, "D.," "W.," and "T.," by purchase, in all of which his authors were infeft and entered with the superior. He took base infeftment in one of these parcels, "W."; but with the exception of the appellant none of the series of heirs upon whom his succession devolved expede a feudal title, or were entered with the superior. In 1810, one of these heirs, the grandfather of the appellant, conveyed these three parcels to trustees for the purpose of paying the truster and his wife an annuity; the truster's debts; and in

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the event of the truster's death before the debts were paid to carry out any deed of settlement he might leave. Power was given to the trustees to sell with the truster's consent. When the debts were paid, or if demanded in 1814, the trustees were to reconvey.

The truster died in 1811. In 1815 the trustees were entered in the lands of "D." and "W." with the superior whose charter confirmed previous infeftments. In 1828 the trustees were entered in the other lands of "T." On each entry they paid a composition of a year's rent.

In 1860 the surviving trustee, by order of the Court, reconveyed the lands to the appellant, the truster's grandson and heir-at-law who was infeft, and by virtue of the Conveyancing (Scotland) Act of 1874 was impliedly entered with the superior. The appellant was not heir to the surviving trustee. On the appellant's entry the superior claimed the composition of a year's rent:—

Held, affirming the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 587), that the appellant was liable to the superior in a composition; because, (*a*) assuming the trust to be simply an incumbrance, he would not have been in a position to enter as heir; (*b*) that the appellant's implied entry in 1874 was not enfranchised by the entry of his grandfather's trustees; and (*c*) that the confirmation in 1815 had not the effect of making the appellant's ancestor an entered vassal: the confirmation having no operation other than to safeguard the investiture of the trustees.

Stuart v. *Jackson* (17 Court Sess. Cas. 4th Series (Rettie), 85); *Duke of Athole* v. *Stewart* (17 Court Sess. Cas. 4th Series (Rettie), 724); and *Duke of Athole* v. *Menzies* (17 Court Sess. Cas. 4th Series (Rettie), 733), assuming them to be correct, must be taken to be not applicable.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland, dated the 28th of February, 1891, on a special case.

The Duke of Buccleuch and Queensberry, K.G., the respondent, was the superior of the lands of "Dornock," "Woolcoats," and "Torbeckhill," in Dumfriesshire; and Sir Frederic John William Johnstone, of Westerhall, Baronet, the appellant, was infeft in these lands, and through the operation of the Conveyancing (Scotland) Act, 1874, impliedly entered with the respondent.

The only question in the appeal was whether the appellant was liable to the respondent in the sum of £671 6*s.* 2*d.*, being a year's rent, the composition due by a singular successor on his entry; or in the sum of £1 13*s.* 8*d.*, being the relief due by an heir of investiture on his entry to the lands.

The appellant's grandfather, Sir John Lowther Johnstone, formerly held these estates on a personal title only, having

inherited Dornock and Woolcoats from his uncle, Sir William Pulteney, and Torbeckhill from his cousin, Lady Bath, daughter and heiress of Sir William Pulteney. The special case stated that Sir John Lowther Johnstone "was duly infeft" therein; but the tenor of the deeds incorporated in the case indicated that this was an error, and on the last day of the argument counsel stated that, in accordance with their Lordships' suggestion, search had been made in the register of sasines and no sasine found, and that, therefore, it was clear Sir John Lowther Johnstone's title was merely a personal one, which had not been feudalized by infeftment.

By trust disposition, dated the 10th of December, 1810, Sir J. Lowther Johnstone, stating that he was indebted to various persons considerable sums of money, and was anxious to put his affairs in a regular train of management for payment of his creditors, conveyed all the land belonging to him in Scotland, and, inter alia, the lands above mentioned of Dornock, Woolcoats, and Torbeckhill, to David Cathcart (afterwards Lord Alloway) and Masterton Ure as trustees for executing the trust, with power to sell any part of the lands necessary with the truster's consent: (Second) For the payment to the truster during his life, and the subsistence of the trust, of an annuity, part of which was to be continued to his widow: (Third) for payment of debts: (Fourth) In the event of the truster's death, to act as his trustees and executors, and to carry into effect the provisions contained in a deed of disposition and settlement executed by him in favour of his wife and children, &c.: (Sixth) Declared: "That these presents are granted for and to this special end and effect, that the said trustees may apply the prices of such lands and others above disponed if sold, and rents thereof, preceding the purchaser's entry, and whole other funds, heritable and moveable, hereby disponed and assigned, after deduction of the public burdens affecting the said estates," &c. . . . "in the payment of all the just and lawful debts due by me at the date hereof, both principal and interest" . . . "It being hereby expressly understood and conditioned that after payment of my debts, as said is, my said trustees shall make payment to me, my heirs or assignees,

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secluding executors, of the residue of the money or other moveable property in their hands falling under or arising from this trust, if any shall remain; and shall, when the said debts are fully paid off, or at the term of Martinmas, 1814, convey and redispone to me and my foresaids the whole of the remainder of my said lands and estates and other heritable property which shall not have been disposed of, with warrandice from fact and deed only: And which reconveyance, if required by me by a writing under my hand, shall take place at the said term of Martinmas, 1814, whether my debts are then paid off or not; It being hereby expressly provided that the said trust and the whole powers vested in the said trustees shall subsist and continue ay and until the said trustees shall be relieved of all advances of money and obligations whatsoever they may either jointly or individually be under on my account, and the said trustees shall be entitled to hold the whole subjects hereby disponed and made over till they are relieved accordingly: And declaring that in the event of my death before the said reconveyance shall take place, and my heir being a minor" (both events happened), "the said trust shall subsist and continue as to the whole subjects, both lands and others, till my whole debts are paid off." The deed then contained an obligation by the truster to infeft by two several infeftments and manners of holding, and also a procuratory of resignation. Finally, the deed stated, "But in trust always for the uses and purposes before specified."

Prior to the date of this deed the state of the titles to the land in question were:—

"Dornock" and others had been the property of James Douglas, who was entered as vassal therein by the respondent's predecessor in 1730.

"Woolcoats" (including Axletreewell and others) was the property of James Douglas in liferent and Archibald Douglas, his son, in fee, and they were entered as vassals by the respondent's predecessor in 1720.

In a process of ranking and sale before the Lords of Session at the instance of Patrick Lord Elibank against James and Archibald Douglas and their creditors, the above lands of "Dornock," &c., and "Woolcoats," &c., were, by a decreet of

sale dated the 27th of July, 1768, sold and adjudged to William Alexander, his heirs and assigns. In implement of which Archibald Douglas appears by the charter referred to below of 1815 to have granted a disposition of the lands in favour of Alexander: which was followed by an instrument of sasine dated the 7th of November, 1772, and recorded in the following January. By disposition in 1775, Alexander made over these lands, with the decreet of sale to Sir William Pulteney of Bathhouse with warrant to infeft and precept of sasine, which was followed by implement of sasine as regards Woolcoats in the same year. Neither Alexander nor Sir William Pulteney obtained an entry from the superior, but both appear to have been infeft base in Woolcoats.

On the 10th of November, 1809, Sir John Lowther Johnstone acquired right of these lands by special service as heir of line of the deceased Sir William Pulteney; but as stated above, Sir John Lowther Johnstone never feudalized his personal right.

"Torbeckhill" and others. These lands were, some time prior to the death of Sir J. Lowther Johnstone, the property of Margaret Graham, who was entered as vassal therein by the respondent's predecessor on the 15th of August, 1765. Margaret Graham, by contract dated the 5th of June, 1765, disponed the lands to David Armstrong. In a process of ranking and sale at the instance of Messrs. Douglas Heron & Co. against Armstrong and his creditors, these lands were purchased for behoof of William (afterwards Sir William) Pulteney, and adjudged to belong to him by a decreet of sale on the 21st of January, 1790. By general service as heiress of her father, H. L. Pulteney, Countess of Bath, acquired a personal right to these lands. She was succeeded by her cousin-german, Sir John Lowther Johnstone, who served heir in general special to her.

Sir John Lowther Johnstone died in 1811, neither he nor any of his ancestors being entered in any of these lands with the superior. He left a trust disposition and settlement in favour of himself in liferent and a series of heirs in fee dated the 25th of February, 1810.

The trustees appointed by the trust disposition dated the 10th of December, 1810, completed a title in their own persons

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to the lands by obtaining on the 16th of November, 1814, decree against Sir Frederick George Johnstone, the only son and heir of Sir John Lowther Johnstone, the truster, as charged to enter as nearest and lawful heir in general to his grand-uncle, Sir William Pulteney, and which decree adjudged the lands of "Dornock" and "Woolcoats" from him, and declared them to belong heritable and irredeemably to the said trustees "for the uses and purposes of the said trust disposition." In the following year the trustees were entered with the superior, the then Duke of Buccleuch and Queensberry, and obtained from his commissioner a charter of sale, adjudication, and confirmation, dated the 27th of March, 1815. This charter described the lands and set out in extenso the purposes of the trust deed of December, 1810, and then recited—(1.) The right of the Douglases; (2.) The decreet of sale of the 27th of July, 1768, adjudging the lands from the Douglases to Alexander; (3.) The disposition of the 7th of April, 1775, from Alexander to Sir William Pulteney, "registered on the 19th of August, 1778"; (4.) The service of Sir John Lowther Johnstone as heir of line to his uncle, Sir William Pulteney; (5.) The deed of trust of 1810 and the adjudication against Sir Frederick George Johnstone, "which declared the same to belong to the trustees for the uses and purposes of the said trust disposition;" "And further approve and confirm as I hereby, as commissioner foresaid, ratify and approve and perpetually confirm a disposition of the foresaid lands of 'Woolcoats,' &c., granted by the said Archibald Douglas younger of Dornock to the said William Alexander, dated the 1st of August, 1768, and registered in books of Council on the 17th of January, 1769, with the obligation to infeft a me and precept of sasine therein contained, and instrument of sasine following thereon in favour of the said William Alexander, dated the 7th of November, 1772, and registered in the general register of sasines on the 2nd of January thereafter: As also disposition of the said lands by William Alexander to the aforesaid Sir William Pulteney (then William Pulteney) with obligation to infeft a me &c., and instrument of sasine following thereon in favour of Sir William Pulteney on the 2nd of May, 1775, and registered in the general register of sasines on the 8th of June, 1775."

"In so far as the said two dispositions and instruments of sasine above confirmed respect the lands of Woolcoats," &c., which were by the decreet of adjudication adjudged by David Cathcart, Lord Alloway, and Masterton Ure from Sir Frederick George Johnstone, as lawfully charged to enter heir in special to the said Sir William Pulteney, who stood infeft in these lands by infeftment above confirmed. And that in the whole heads, &c., of the two dispositions and instruments of sasine before confirmed dispensing with the generality hereof and declaring the present confirmation to be equally valid as if the said writs themselves had been verbatim inserted, to be holden the foresaid respective lands by the said David Cathcart, Lord Alloway, Masterton Ure, the trustees aforesaid and the survivor of them and his or their successors and assigns, of and under the said Duke of Buccleuch and Queensberry, &c., as immediate lawful superiors of the same. "But in trust always for the uses and under the provisions before specified."

Later the trustees proceeded to make up their title to "Torbeckhill." On the 14th of February, 1827, they obtained a decree of adjudication of the lands of Torbeckhill against Sir Frederick George Johnstone, charging him to enter as heir in general special to the Countess of Bath, &c.; and on the 20th of November, 1827, they obtained decree of adjudication from John Bell Thomson as heir apparent to and as representing his great-grandmother, Margaret Graham. On the 15th of February, 1828, the trustees obtained a charter of adjudication in implement from the superior, the then Duke of Buccleuch and Queensberry. This charter recited the trust disposition of December, 1810, and disponed to the trustees all and whole the lands of "Torbeckhill," but in trust always agreeable to the uses specified in the said trust deed. The charter then proceeded to deduce the title from Margaret Graham, narrating the sales given above, "which decree of sale and lands Henrietta Laura Pulteney, Countess of Bath, daughter and only child of the said Sir William Pulteney and cousin-german of the said Sir John Lowther Johnstone, acquired right by her general service as heiress to her father." It then recited the adjudications at the instance of the trustees against "(1.) Sir Frederick George

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Johnston, son and heir of Sir John Lowther Johnstone, as lawfully charged to enter heir in general service special to the said Henrietta Laura Pulteney, and (2.) against John Bell Thomson as representing Margaret Graham. This charter passed over Sir John Lowther Johnstone; and there appeared to be no clause of confirmation.

The trustees on entering by these charters in 1815 and 1828 paid on each entry a casualty of composition, being a year's rent of the lands out of the trust funds.

In 1856 Sir Frederic John William Johnstone, the appellant, the grandson of Sir John Lowther Johnstone, with consent of his curator, raised an action of declarator, count, reckoning, and payment against Masterton Ure, the surviving trustee, concluding, inter alia, that on Masterton Ure receiving a discharge he was bound to reconvey and dispone the whole property then remaining vested in him under the trust disposition of December, 1810, to and in favour of the appellant, as having right thereto under the disposition and settlement of his grandfather, and to the heirs substituted to him in the said settlement. In accordance with the order of the Court, Masterton Ure, on the 16th of March, 1860, granted a disposition of the lands in question in favour of the appellant, whom failing, the heirs called after him to the succession. The appellant was infeft in these lands by recording on the 27th of September, 1860, the foresaid disposition, and was impliedly entered with the superior by virtue of sect. 4 of the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94). The question then arose whether he was liable on such implied entry to pay to the superior, the respondent, a composition, or relief duty only.

Masterton Ure, the surviving trustee, died in 1863. The special case was first heard before the Lord Justice Clerk, Lord Rutherfurd Clark, and Lord Lee, judgment being reserved. Lord Lee prepared a written judgment in which his Lordship expressed his opinion that Sir John Lowther Johnstone had never been infeft, but that the appellant was only bound to pay a relief and not a composition. His Lordship dying before delivery of judgment, the case was reheard on the same special case.

On the 28th of February, 1891, the Second Division of the Court of Session held that the appellant was liable in a composition (1). Lord Young dissented, and Lord Rutherfurd Clark doubted.

On appeal,

Feb. 25, 26, 29; March 1, 3. *Henry Johnston*, and *Craigie* (both of the Scotch bar), (with them *Le Breton*), for the appellant:—

The appellant is only bound to pay relief duty. The Court of Session decided the case on the footing that Sir John Lowther Johnstone "was duly infeft" in these lands; and it is too late now to question what was then assumed to be the fact.

[*The Solicitor-General for Scotland*, for the respondent:—The words in the special case, "was duly infeft," did not represent the fact. The deeds incorporated in the case shewed clearly that Sir John Lowther Johnstone was not infeft, and held only on a personal title, which he never feudalized.

[LORD WATSON:—Their Lordships cannot decide the case on erroneous facts. If Sir John Lowther Johnstone was infeft the sasine can easily be produced by searching the register (2).]

A search will be made. In the meantime, the logical inference from the late cases on this subject is that the trustees' entry enfranchised the truster and his heirs. Here the trustees received the investiture as and for the truster. Following the statutory provisions of 20 Geo. 2, c. 50, and previous Acts, a series of cases decided that the superior, if required to give a new investiture, was bound to give a charter in favour of the vassal and any series of heirs the vassal thought fit to name; which heirs when they came forward and claimed an entry the superior was bound to enter on payment of relief duty only: see Prof. Menzies' Lectures on Conveyancing; *Lockhart* v. *Denham* (July 10, 1760) (3); *Duke of Argyle* v. *Earl of Dunmore* (Nov. 19, 1795) (4);

(1) 18 Court Sess. Cas. 4th Series (Rettie), 587.

(2) The registration of sasine is provided by the Acts: 1617, c. 16; 1693, c. 13; 8 & 9 Vict. c. 35; 21 & 22 Vict. c. 76; 31 & 32 Vict. c. 101, ss. 15, 142.

(3) 2 Ross. L. C. 329; Mor. Dict. 15047.

(4) 2 Ross. L. C. 335; Mor. Dict. 15068.

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Stirling v. *Ewart* (Sept. 4, 1842–4) (1); *Duke of Hamilton* v. *Baillie* (Nov. 22, 1827) (2); *Duke of Hamilton* v. *Earl of Hopetoun* (March 8, 1839) (3); and the *Marquess of Hastings and Curator* v. *Oswald* (May 27, 1859) (4). In *Advocate General* v. *Swinton* (Nov. 14, 1854) (5), it was held that when a composition was paid on the entry of a disponee, the interposition of a trust to execute an entail in favour of the disponee and a series of heirs, did not render him liable to pay another composition. That case also decided that the Court ought not to be governed by the strict form of the transaction, but by the substance or intention. The object of the trust deed of December, 1810, was to give possession to the trustees for a special purpose, which when completed they were to reconvey to the truster, if he survived, and if not to his heir: see *Heriot's Hospital* v. *Carnegy* (Oct. 31, 1884) (6); *Mackintosh* v. *Mackintosh* (March 5, 1886) (7); *Marquis of Huntley* v. *Earl of Fife* (July 20, 1887) (8).

The superior had notice of the trust deed executed by Sir John Lowther Johnstone, its purposes being fully incorporated in the charter. The investiture of the trustees was therefore not an enfranchisement purely of the trustees' own personal title, but of the heir of the destination for whom they held and to whom they were to convey. The trust estate was a mere burden on the radical estate. If the truster had himself been infeft, on fulfilment of the trust the burden would have flown off. If the trustees themselves took an investiture, it might be that they would have to grant a reconveyance to the heir; but that did not increase the rights of the superior. On trust titles, see *Campbell* v. *Edderline* (Jan. 14, 1801) (9); *Gilmour* v. *Gilmour* (July 3, 1873) (10). In *Stuart* v. *Jackson* (Nov. 15, 1889) (11),

(1) 2 Ross. L. C. 340; 4 Court Sess. Cas. 2nd Series (Dunlop), 684, at pp. 691, 733; 3 Bell's Ap. 128.

(2) 2 Ross. L. C. 389.

(3) 2 Ross. L. C. 391; 1 Court Sess. Cas. 2nd Series (Dunlop), 689.

(4) 21 Court Sess. Cas. 2nd Series (Dunlop), 871.

(5) 17 Court Sess. Cas. 2nd Series (Dunlop), 21.

(6) 12 Court Sess. Cas. 4th Series (Rettie), 30.

(7) 13 Court Sess. Cas. 4th Series (Rettie), 692.

(8) 14 Court Sess. Cas. 4th Series (Rettie), 1091.

(9) 1 Ross. L. C. 458; Mor. App. Voce Adjudications, No. 11.

(10) 11 Court Sess. Cas. 3rd Series (Macpherson), 853, at p. 857.

(11) 17 Court Sess. Cas. 4th Series (Rettie), 85.

apparently Lord Shand would not have differed if the truster had had the power to recall the trust. *Stuart* v. *Hamilton* (July 18, 1889 (1) and *Grindlay* v. *Hill* (Jan. 18, 1810) (2) were there referred to; and *Duke of Athole* v. *Menzies* (March 20, 1890) (3) followed.

Solicitor-General for Scotland (*A. Graham Murray*, Q.C.), (with him, *P. J. Blair*, of the Scotch bar), for the respondent:—

The early cases relied on by the appellant go no further than this, that if there is an investiture, then mere form will not be held to be prejudical. Sir John Lowther Johnstone, the truster, had a decreet of sale which until completed by a recorded sasine was a mere personal right. He never took the necessary steps to feudalize this right, as the deeds clearly shew he never was infeft. Confirmation, therefore, in the charter to the trustees of any title in Sir William Pulteney is entirely absent except as to Sir William's infeftment in Woolcoats. What the superior enfranchised was the destination to the trustees: practically they entered as purchasers under the decreets of sale. In *Lockhart* v. *Denham* (4) there was no question of substituting one destination for another. There is no doubt the superior may have put before him whomsoever the vassal likes in a new investiture; but the superior cannot be taken to have enfranchised two destinations at the same time.

There was no doubt as to what destination was sanctioned in *Stirling* v. *Ewart* (5). Here there is no acknowledgment of any destination; therefore that case cannot apply. In the *Marquess of Hastings and Curators* v. *Oswald* (6) it was a new entail, and the Court decided that the institute could demand entry on payment of relief, he possessing the character of heir under the prior entail; which for this purpose was not destroyed. There, all the cases were examined by Lord Wood (7). *Mackintosh* v.

(1) 16 Court Sess. Cas. 4th Series (Rettie), 1030.

(2) 15 Fac. Coll. 518.

(3) 17 Court Sess. Cas. 4th Series (Rettie), 733.

(4) 2 Ross. L. C. 329; Mor. Dict. 15047.

(5) 2 Ross. L. C. 340; 4 Court Sess. Cas. 2nd Series (Dunlop) 684; 3 Bell's Ap. 128.

(6) 21 Court Sess. Cas. 2nd Series (Dunlop), 871.

(7) 21 Court Sess. Cas. 2nd Series (Dunlop), 871, at p. 874.

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Mackintosh (1) shewed the same thing. The judgment in *Advocate General* v. *Swinton* (2) is correct; but Lord Deas's opinion contains obiter dicta. *Ferrier's Trustees* v. *Bayley* (May 26, 1877) (3), the first case after the Conveyancing Act of 1874, held that the implied entry given by the Act to a person holding an infeftment on an "a me vel de me" precept unconfirmed by the superior had the effect of extinguishing the mid-superiority, so that it was no longer competent for such person to demand an entry in the name of the heir to the mid-superiority.

In *Lamont* v. *Rankin's Trustees* (1879–80) (4) the principle of *Ferrier's Trustees* v. *Bayley* (3) was affirmed in this House. *Rossmore's Trustees* v. *Brownlie* (Nov. 23, 1877) (5) followed the latter case. Then came *Mackintosh* v. *Mackintosh* (March 5, 1886) (1). *Stuart* v. *Hamilton* (July 18, 1889) (6) and *Stuart* v. *Jackson* (Nov. 15, 1889) (7), were both before Lord Kinnear as Lord Ordinary. When they were heard before the Second Division the parties were told to confine their argument to the general question and send a written argument to the judges. *Stuart* v. *Hamilton* (6) was first decided on the general question, and seven judges out of thirteen practically held it was ruled by *Ferrier's Trustees* v. *Bayley* (3) and *Lamont* v. *Rankin's Trustees* (4). When *Stuart* v. *Jackson* (7) came on for decision the late Lord President (Inglis), who was with the majority in *Stuart* v. *Hamilton* (6), altered his opinion on the special facts of *Stuart* v. *Jackson* (7), on which there had been no argument, and held relief was only payable. So, as an authority, *Stuart* v. *Jackson* (7) does not stand high.

As to the trust being a burden on the prior right, see *Lord Home* v. *Lyell* (8). Again, those cases where mere form has not been regarded were cases where no feudal difficulty stood in the way of giving effect to the substance of the transaction. If the

(1) 13 Court Sess. Cas. 4th Series (Rettie), 692.

(2) 17 Court Sess. Cas. 2nd Series (Dunlop), 21.

(3) 4 Court Sess. Cas. 4th Series (Rettie), 738.

(4) 6 Court Sess. Cas. 4th Series (Rettie), 739; 5 App. Cas. 44.

(5) 5 Court Sess. Cas. 4th Series (Rettie), 201.

(6) 16 Court Sess. Cas. 4th Series (Rettie), 1030.

(7) 17 Court Sess. Cas. 4th Series (Rettie), 85.

(8) 15 Court Sess. Cas. 4th Series (Rettie), 193.

late Lord President was correct in *Stuart* v. *Jackson* (1), *Russell* v. *Macdowall and Selkrig* (Feb. 6, 1823) (2) cannot stand. Here there is no old investiture to refer to. The appellant is not the heir of the last entered vassals, the Douglases and Graham. Following the case of *Stuart* v. *Jackson* (1) came the *Duke of Athole* v. *Stewart* (March 20, 1890) (3), and the *Duke of Athole* v. *Menzies* (March 20, 1890) (4), holding that relief was only payable.

The old case of *Grindlay* v. *Hill* (Jan. 18, 1810) (5) established that the Court must judge of the composition payable by considering what the trustees might do under the charter. It must not be forgotten that here as long as a survivor of the trustees lived the superior could not raise an action of declarator of non-entry, because the fee was full. Sect. 1 of the Act 50 & 51 Vict. c. 69, is a recognition of the respondent's contention.

Craigie, in reply :—

Search made has established that Sir John Lowther Johnstone was never infeft. But on the authority of the *Advocate General* v. *Swinton* (6), if trustees pay composition on their entry under a trust deed directing them to pay debts and then reconvey to the heir of the truster, the heir of the truster is not a stranger to the investiture, and he is only bound on that reconveyance to pay relief duty. When the trustees in 1815 obtained the charter they had only one duty to perform, to pay debts and reconvey. As the heir of Sir William Pulteney as well as Sir John Lowther Johnstone, the appellant is entitled to rely upon the confirmation in the charter of 1815 of Sir William's infeftment in Woolcoats, which confirmation had the effect of enfranchising Sir William Pulteney's heirs in these lands.

Judgment after consideration.

(1) 17 Court Sess. Cas. 4th Series (Rettie), 85.
(2) 1 Ross. L. C. 505.
(3) 17 Court Sess. Cas. 4th Series (Rettie), 724.
(4) 17 Court Sess. Cas. 4th Series (Rettie), 733.
(5) 15 Fac. Coll. 518.
(6) 17 Court Sess. Cas. 2nd Series (Dunlop), 21.

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LORD WATSON:—

My Lords, the appellant is proprietor of three parcels of land, known respectively as Dornock, Woolcoats, and Torbeckhill, situated in the county of Dumfries, and within the Dukedom of Queensberry, which is now vested in the respondent. These lands were conveyed to the appellant by Masterton Ure, as trustee under a disposition executed by Sir John Lowther Johnstone of Westerhall, the appellant's grandfather. In September, 1860, the appellant recorded his conveyance in the general register of sasines; and, immediately on the passing of the Conveyancing and Land Transfer (Scotland) Act, 1874, he, by virtue of its provisions, became the entered vassal of the respondent, and (Mr. Ure having died in the interval) also liable in payment of a feudal casualty in respect of his entry. The parties have differed as to the casualty payable; and they have adjusted a special case, in order to obtain a decision upon the question whether the appellant's liability is that of an heir or of a singular successor. The Second Division of the Court, by a majority of three judges against one, have held that he is a singular successor, and must therefore pay composition, being a year's rent of the lands.

The true relation of the appellant to his superior, whether that of heir of the standing investiture, or that of a stranger to it, can only be ascertained by reference to the titles under which these parcels of land were acquired and held by the predecessors in title whom the appellant represents, until they became vested in his person. I shall, therefore, endeavour to describe, as briefly as may be consistent with accuracy, the state of possession and title, since their acquisition, during the last century, by the appellant's ancestor, Sir John Pulteney, afterwards Earl of Bath.

In the year 1768, Dornock, which then belonged to John Douglas of Dornock, and Woolcoats, in life-rent, and to his son Archibald in fee, both father and son being duly entered with the superior, were exposed to judicial sale, and were purchased by one William Alexander, who obtained a decree of sale, in virtue of which he was base infeft in Woolcoats. On the 7th of April, 1775, he conveyed both parcels, and assigned the decree of sale to Sir William Pulteney, who also took base infeftment in Woolcoats. Upon his death the lands were possessed by

his nephew, Sir John Lowther Johnstone, without expeding a feudal title.

The third parcel, the lands of Torbeckhill, were, in June, 1765, disponed by Margaret Graham, who was fully entered with the superior, to David Armstrong, of Kirtleton, whose personal right was brought to judicial sale by his creditors, and was purchased by Sir William Pulteney. He obtained a decree of sale on the 21st of January, 1790, under which he possessed without taking infeftment; and, on his decease, the lands passed into the possession of his daughter and heir of line, Henrietta Laura Pulteney, Countess of Bath, upon whose death they passed to her cousin-german, Sir John Lowther Johnstone. Neither the Countess nor her successor made up a title or was infeft.

On the 10th of December, 1810, Sir John Lowther Johnstone, being then in possession of all three parcels under his personal title, conveyed them, along with the rest of his Westerhall estates, to David Cathcart and Masterton Ure, but that in trust only for payment of his debts, and of annuities to himself and his wife, and the fulfilment of any provisions contained in deeds of settlement executed, or to be executed, by him. The power of the trust disponees to deal with the fee of the trust estates was limited to selling such portions thereof as might be deemed necessary, with the consent of the truster expressed in writing. They were bound to reconvey, the debts being paid off, on or before the 11th of November, 1814; and, after that date, whenever required to do so by the truster, whether his debts were paid or not. In the event of the truster's death before reconveyance, and of his heir being then in minority, it was declared that the trust should subsist until his whole debts were paid off, the heir in the meantime receiving an allowance.

Sir John Lowther Johnstone, the truster, died in 1811, leaving a deed of settlement by which he conveyed his estates, including Dornock, Woolcoats, and Torbeckhill, to himself in life-rent, and to the heirs male of his body and certain heirs-substitute seriatim in fee, subject to family provisions which were implemented by his trustees.

The trustees appointed by the deed of 1810 appear to have entered at once upon the administration of the trust estates,

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which they carried on jointly until the death of Mr. Cathcart in 1829. After the death of the truster they proceeded to complete a title by adjudication to Dornock and Woolcoats, in which they were duly infeft; and on payment of a composition they obtained from the respondent's predecessor a charter of sale adjudication and confirmation, dated the 27th of March, 1815, which expressly confirms the base infeftments taken in Woolcoats by William Alexander and his disponee, Sir William Pulteney. They next adjudged and were infeft in the lands of Torbeckhill, and then entered as singular successors with the late Duke of Buccleuch and Queensberry, obtaining from his Grace a charter of adjudication in implement, dated the 15th of February, 1828.

It is proper to notice here that the special case contains express averments to the effect that Sir John Lowther Johnstone was duly infeft in Dornock and Woolcoats, and also in Torbeckhill. These statements appeared to your Lordships to conflict with the tenor of documents of title which are incorporated with and form part of the case; and your Lordships, therefore, required the parties either to explain the discrepancy or to inform the House of the true state of the facts. The result was that the parties, by their counsel, concurred in stating to your Lordships that the statements in the case were inaccurate; and that, with the single exception of Sir William Pulteney's infeftment in Woolcoats, no sasine was taken in any of the three parcels either by Sir William Pulteney, or by any ancestor and predecessor of the appellant.

At the death of the truster, Sir John Lowther Johnstone, in 1811, the heir entitled to succeed was his eldest son, Sir Frederick George Johnstone, the appellant's father, who died in 1841 without having made up any title to the lands. Some years after his decease the appellant raised an action in the Court of Session for the purpose of compelling the surviving trustee of his grandfather to denude in his favour; and the conveyance upon which the appellant has been infeft and obtained a statutory entry with his superior was executed in obedience to a decree of the Court.

It thus appears that the appellant does not represent any predecessor in these three parcels of land who was during his lifetime an entered vassal. He is not the heir of the trustee from

whom he derives his feudal title, and he is not the heir either of the Douglases of Dornock or of Margaret Graham, who were or had been the last entered vassals at the dates when the trustees of Sir John Lowther Johnstone completed their titles to Dornock, Woolcoats, and Torbeckhill by obtaining charters of confirmation from the superior following upon decrees of adjudication in their favour. He is, however, the representative and heir of Sir William Pulteney and his daughter, as well as of his own father and grandfather. But not one of his predecessors was entered with the superior, or was even infeft base in Dornock or Torbeckhill. The state of their title to Woolcoats differs in this respect only, that Sir William Pulteney took base infeftment in that parcel—a circumstance which gave rise to an argument for the appellant which I shall notice in due course.

The appellant's counsel strongly relied upon the recent case of *Stuart* v. *Jackson* (1), which was decided by the whole Court, and was followed by the Judges of the Second Division (Lord Rutherfurd Clark dissenting), in *Duke of Athole* v. *Stewart* (2), and *Duke of Athole* v. *Menzies* (3). In *Stuart* v. *Jackson* (1), there was much and serious diversity of judicial opinion; but the majority of their Lordships held that the terms of a trust disposition executed by an entered vassal were such that although the trustees took infeftment and were entered with the superior by force of the statute of 1874, their right constituted a mere incumbrance upon the standing investiture; and, consequently, that the heir of the truster who expeded a title by taking a conveyance from the trustees was entitled to enter upon payment of relief duty. I do not think it is necessary for your Lordships in disposing of this appeal to consider the merits of these decisions, or the conflicting opinions expressed by the learned Judges who took part in them. Had Sir John Lowther Johnstone, or his predecessors, been duly infeft and entered, the case would have been different. But these decisions, assuming them to be sound, only go this length, that the heir of an entered vassal is not divested of that character by the fact that the ancestor whose heir he is has

(1) 17 Court Sess. Cas. 4th Series (Rettie), 85.

(2) 17 Court Sess. Cas. 4th Series (Rettie), 724.

(3) 17 Court Sess. Cas. 4th Series (Rettie), 733.

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created a trust which does not extinguish, but is a mere burden upon, the investiture. Even if the trust created by Sir John Lowther Johnstone were held to be simply an incumbrance, the appellant's position would be no better now than if the trust had never been in existence; and in that case he would not have been in a position to enter as an heir. It cannot be said in this case, as was held in these decisions, that the appellant takes from an entered predecessor, either non obstante the trust, or through the medium of the trust.

Then it was argued that the superior's confirmation, by the charter of March, 1815, of Sir William Pulteney's infeftment in the lands of Woolcoats had the effect of making him an entered vassal, and of enfranchising his heirs in these lands. No authority was cited to us which bears out that proposition, which appears to me to be founded upon a misconception of the object of confirmation, which is to fortify and complete the investiture of the person obtaining the charter. Beyond what is necessary for that purpose, confirmation of prior writs by the superior has, in my opinion, no operation whatever. My views upon this point are so fully and satisfactorily expressed in the judgment of Lord Trayner (1) that I shall not discuss it farther.

It was also urged, on behalf of the appellant, that his entry was enfranchised by the previous entry of his grandfather's trustees upon payment of a composition; and in support of that argument, he mainly relied upon *Advocate-General* v. *Campbell Swinton* (2). That case was a very special one, and does not appear to me to have any material bearing upon the facts before us. The person from whom a composition was claimed was at the time the entered vassal of the Crown, and had already paid a composition; and the opportunity afforded to the superior of claiming a second composition was entirely due to the form of conveyancing which the parties had adopted, with the object of subjecting him to entail fetters. The judgments of four out of the five learned Judges who constituted the Court of Exchequer proceeded on these specialties. That of Lord Deas went farther, and contains many dicta which, so far as I know,

(1) 18 Court Sess. Cas. 4th Series (Rettie), at p. 591.

(2) 17 Court Sess. Cas. 2nd Series (Dunlop), 21.

are without authority, and with which I am not prepared to agree.

I am, accordingly, of opinion that the interlocutor appealed from ought to be affirmed, and the appeal dismissed with costs, and I so move your Lordships.

LORD HALSBURY, L.C., concurred.

LORD MACNAGHTEN :—

My Lords, I have had an opportunity of reading the judgment of my noble and learned friend, Lord Watson, and I entirely concur in it.

LORD HANNEN also concurred.

Ordered and Adjudged *in the name of the House of Lords, by the Lords of Appeal sitting in the House of Lords during the dissolution of Parliament, pursuant to the provisions of the Appellate Jurisdiction Act*, 1876: *That the Interlocutor appealed from be affirmed; and the appeal dismissed with costs.*

Lords' Journals, 25th July, 1892.

Agent for the appellant: *Henry S. Sherry, for Welsh & Forbes, Solicitors, Edinburgh.*

Agents for the respondent: *Grahames, Currey, & Spens, for Strathern & Blair, W.S., Edinburgh.*

Considered. In re St. Saviour's, Walthamstow [1951] P. 147

[PRIVY COUNCIL.]

J. C.* 1891 June 10, 11, 12, 15, 16; July 2, 3, 7, 8. 1892 Aug. 2.

READ AND OTHERS . . . . . APPELLANTS;

AND

THE BISHOP OF LINCOLN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF THE ARCHBISHOP OF CANTERBURY.

Ecclesiastical Law—Bishop—Communion Service—Lighted Candles—Administration of Mixed Chalice—Eastward position—Singing of Hymn "Agnus Dei"—Rule as to Evidence of Historical Facts—Finality of Privy Council Judgments.

Where it is important to ascertain ancient facts of a public nature, the law permits historical works to be referred to as evidence thereof.

The rule of finality applicable to decisions of the Privy Council in relation to rights of property is not equally binding as regards decisions which relate to ritual and ecclesiastical practice and depend to some extent upon the accuracy of historical investigation.

Held, affirming the judgment of the archbishop, that, although the mixing of wine with water in and as part of the Communion service is against the law of the Church, yet that the use of a cup mixed beforehand does not constitute an ecclesiastical offence:

Held, that the choir's singing of the hymn "The Agnus" before and during the reception of the elements is not illegal:

Held, that the priest's standing at the northern end of the west side of the table during the whole of that part of the Communion service which intervenes between its commencement and the ordering of the bread and wine before the Prayer of Consecration is not illegal.

It being admitted that two candles, not required for the purpose of giving light, were alight throughout the celebration on the holy table without objection on the part of the respondent, who was officiating as bishop, but there being no evidence either of a ceremonial use of the lights, or that the respondent had introduced them as unlawful ornaments, *held* that the respondent was not responsible therefor, and that his making no objection thereto was not an ecclesiastical offence.

Held, that where promoters have established the commission of an ecclesiastical offence, they are not entitled as of right to a monition; but that

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* *Present:*—THE LORD CHANCELLOR, LORD HOBHOUSE, LORD ESHER, LORD HERSCHELL, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND. *Ecclesiastical Assessors:*—THE BISHOP OF CHICHESTER, THE BISHOP OF ST. DAVID'S, and THE BISHOP OF LICHFIELD (now ARCHBISHOP OF YORK).

the archbishop was entitled, on being satisfied that the offence would not be repeated, to accept the assurance of future submission.

APPEAL from parts of a decree dated the 21st of November, 1890, of the Court of the Archbishop of Canterbury. The report of the case in that Court will be found in [1891] P. 9.

Sir *Horace Davey*, Q.C., Dr. *Tristram*, Q.C., and *Danckwerts*, for the appellants:—

The appeal seeks the reversal of such parts of the judgment as were in the respondent's favour, and the pronouncing of such monition as the ecclesiastical law provides in respect of those charges which had been established. It relates, therefore, to (*a*) the administration of the mixed chalice; (*b*) the not standing at the north side of the table during the Communion Service; (*c*) the singing of the "Agnus Dei" after the consecration of the elements by the respondent and before or during their administration to the communicants; (*d*) the use of candles on the Communion table when not required for the purposes of giving light, and the ceremony of ablution or cleansing the paten and the chalice as part of the service.

With regard to (*a*), it had been condemned in *Hebbert* v. *Purchas* (1); (*b*) it had been settled in that case and in *Ridsdale* v. *Clifton* (2); (*c*) it had not hitherto been before the Privy Council, but had been condemned by Sir R. Phillimore in *Elphinston* v. *Purchas* (3), as Dean of the Arches Court, and also in *Martin* v. *Mackonochie* (4); and see *Clifton* v. *Ridsdale* (5); (*d*) the use of candles was condemned by Dr. Lushington in *Westerton* v. *Liddell* (6), who was not appealed from on that point, and by the Privy Council in *Martin* v. *Mackonochie* (7). The ceremony of ablution is treated by the archbishop as unlawful if done as part of the service.

Although no question of doctrine was directly involved in this case, yet the ceremonies complained of represented doctrines, and were historically expressive of theological opinion with

(1) Law Rep. 3 P. C. 605.
(2) 2 P. D. 276.
(3) Law Rep. 3 A. & E. 98.
(4) Law Rep. 4 A. & E. 290.
(5) 1 P. D. 318, 323.
(6) Moore's Special Report.
(7) Law Rep. 2 P. C. 365.

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regard to the nature of the Holy Communion as a sacrifice. With the exception of ablution all the ceremonies objected to are found in the first Prayer Book of Edward VI., and are omitted from subsequent prayer books. The doctrinal views of the two Prayer Books of that reign should be considered together in order to see what was intentionally omitted in the second, and what is the object in trying to restore those of the first, in which the Holy Communion is described as the Mass, the holy table as an altar, and part of the ceremony is an act of adoration to the Host. Upon the attention to be paid to successive revisions of the Prayer Book, see the judgment of Lord Hatherley in *Sheppard* v. *Bennett* (1). The archbishop had failed to draw the true inference from these changes. Then as to the admissibility of the material on which the judgment below was founded, and which consisted of passages from controversial writings, 145 pictures, and books in the year 1544, supposed to contain the opinion of Cranmer, such evidence, if evidence at all, was only admissible to explain technical terms: see *Shore* v. *Wilson* (2). To shew the common law of the Church, it must be something which was not the subject of controversy, but which was general throughout the Church. The foundations of the judgment in this case should be the rubrics, the historical circumstances of the time in which the Prayer Book was introduced, contemporary evidence as to the meaning of their authors where it is ambiguous, the Injunctions of 1547, Card. Doc. Annals, vol. i. p. 4, the 1st Act of Uniformity (2 & 3 Edw. 6, c. 1), the Injunctions of 1550, the 2nd Act of Uniformity (5 & 6 Edw. 6, c. 1; which established the second Prayer Book), the Elizabethan Act of Uniformity (1 Eliz. c. 2) and Prayer Book, which revised the second Prayer Book of Edward VI., James I.'s Prayer Book, the Canons of 1603-4, the Savoy Conferences of 1661, and the Act of Uniformity of 1662 (14 Car. 2, c. 4), with the present Prayer Book, which came into force on the 24th of August of that year. They are all collected in Cardwell's Doc. Annals. The case for the appellants was that the ceremonies complained of were changes made in the present Prayer Book, and it was for those who sought to bring back the ritual from what was pre-

(1) Law Rep. 4 P. C. 403. (2) 9 Cl. & F. 499.

scribed by the present Prayer Book to what was prescribed in the first Prayer Book of Edward VI. to shew a justification for it. Their intentional omission after having been prescribed shewed that they were now unlawful. There was no direction, for instance, for mixing the wine with water, and the Prayer Book speaks throughout of wine alone. Granting that continuous pre-Reformation usage sanctioned the use of wine and water, still that usage could not be referred to in order to supply an omission which a consideration of all the distinctive differences between the service of the Mass and the Communion Service shewed to be essential and intentional. The acts and matters alleged against the respondent, besides being contrary to and prohibited by the Statutes of Uniformity, have also been held to be ecclesiastical offences by judgments of the Privy Council.

The archbishop's judgment was then read in extenso, and the authorities therein cited were referred to. It was objected that it did not follow the judgments of the Privy Council in previous ecclesiastical cases, or the judgments of the Provincial Court of Canterbury, as precedents and authorities on the question of law. With regard to the evidence upon which the judgment relied as a justification for disregarding the judgments of the ultimate Court of Appeal, and of the co-ordinate Ecclesiastical Courts, it consisted mainly—(1.) of acts, or supposed acts, of various personages, chiefly ecclesiastical, at the time of the Reformation and since; (2.) of writings, controversial and otherwise, connected with the Book of Common Prayer, and the questions raised in this case; (3.) of histories and other records of greater or less authority of past controversies, more or less connected with the points raised in the case, of discussions as to alterations in the service of the Church, of the intentions, opinions, and studies of Cranmer and the revisers of the Books of Common Prayer, of the usages of the Primitive Church—Eastern, and Greek, and Western; and (4.) of prints and pictures, dating from the Reformation onwards. It was contended that it was impossible to collect from such materials, even if admissible as evidence, a sure basis upon which to found any declaration or opinion of the law ecclesiastical, or construction of the formularies of the Church.

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With regard to the mixed cup, the case for the appellant was that in the English pre-Reformation Church, which used the Roman ritual, the only mixing known was the mixing as part of the service; that the custom, if it ever prevailed, of mixing in the vestry and then consecrating a cup previously mixed, was unknown prior to the Reformation, so far as the English Church was concerned. By the second Prayer Book of Edward VI. the only known service of mixing was removed from the English ritual, and if it had been intended to introduce a new and unknown practice of mixing in the vestry and consecrating during the service, directions would have been made to give effect to such intention. They are not given, and there is no ambiguity in the directions which are given in the present Prayer Book, and there is no right to manufacture ambiguity in order to introduce evidence to explain it. The established doctrine of construction in regard to the rubric is that omission is prohibition; there are only two kinds of ceremonies, those which are retained and those which are abolished. Except in the isolated case of Bishop Andrewes, there is no instance known of any case in which wine and water were ever used in the Church of England after the second Prayer Book of Edward VI. It was contended with regard to the archbishop's references to the older forms of liturgies of the Greek and Ethiopic or Coptic Churches, that those liturgies were not available for the purpose of construing the rubrics of the present Prayer Book. [LORD HERSCHELL:—The use of the mixed chalice being almost universal in the earliest Churches, it may be that the practice of mixing as part of the service was an innovation which the Reformers wished to abolish.] The Archbishop finds that "to mingle the cup before service was matter of early usage in the West"; but a perusal of the authorities referred to—viz., Cochleus' edition of Isidore's Treatise and Revision of the Mozarabic Liturgy as used in the 6th and 7th centuries and long before (Isid. Hispal. De Off. Eccl., Lips. 4to, Antv. 8vo, 1534); Burbidge's Liturgies (1885), 196, 202; Lit. Moz. 219, Migne; Hammond, lxiv. 285—and of the Mozarabic, Roman, Ambrosian, Gallican, Syriac Jacobite, and Ethiopic liturgies as they appear in Renaudot, ii., does not discover anything which clearly indicates that the wine was

mixed with water. Even if a practice of mixing beforehand was established, the present Prayer Book does not permit it, and its compilers and their contemporaries appear to have considered that wine alone and not the mixed chalice was intended. (The Bishop of St. David's referred to the Communion office of 1548 in Sparrow's Articles, which was a sort of appendix to the Mass, where the cup consecrated according to the rites of the Mass was nevertheless spoken of as wine.) With regard to contemporary views of the Prayer Book, see Becon's Comparison between the Lord's Supper and the Pope's Mass (ed. 1558), pars. 7, 8, vol. ii. p. 359 (Parker Society); Jewel's Sermons (Parker Society), Sermon on Private Mass in 1565, p. 139; Rastell's Confutation of a Sermon preached by Jewel at Paul's Cross, published in 1565, p. 30; Fulke's Defence of the Translations of the Bible (1583, Parker Society), p. 523; Rogers on Thirty-Nine Articles (1586), p. 296; Whitgift's Works, vol. 2 (Parker Society), tract ix. p. 541, "The Defence of the Answer to the Admonition"; Blakesley's Common Prayer, pp. 310–316; Fulke's Defence of Scripture (1579), p. 522 (Parker ed.). The 20th canon of 1603 is inconsistent with mixing beforehand. The previous decisions of the Privy Council and other Ecclesiastical Courts on this subject, *Martin* v. *Mackonochie* (1), *Elphinston* v. *Purchas* (2), and *Hebbert* v. *Purchas* (3), were referred to. No doubt the ceremony condemned was the conjoint ceremony of mixing and then administering the cup so mixed during the service. But the essential part of the ceremony so condemned was the administration of the mixed cup. It is that which has the important symbolical meaning, and it makes no difference whether the mixing takes place before or during the service.

Upon the subject of the eastward position, reference was made to *Martin* v. *Mackonochie* (4), *Elphinstone* v. *Purchas* (5); *Hebbert* v. *Purchas* (3); *Ridsdale* v. *Clifton* (6). With regard to the fresh light referred to in the last-mentioned case, it must have meant light to be derived from documents subsequently discovered; not that where the Committee has decided a legal question, say the

(1) Law Rep. 2 A. & E. 116.
(2) Law Rep. 3 A. & E. 67.
(3) Law Rep. 3 P. C. 605.
(4) Law Rep. 2 P. C. 382.
(5) Law Rep. 3 A. & E. 109.
(6) 2 P. D. 276.

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construction of the ornaments rubric as affected by the subsequent Act of Parliament, or whether the Injunctions of 1547 were or were not repealed by the Act of Uniformity in 1549, that decision is to be subject to fresh argument. As to finality of the decisions of the House of Lords and Privy Council, reference was made to *Attorney-General* v. *Dean and Canons of Windsor* (1) and *Tooth* v. *Power* (2); *Dixon* v. *Caledonian Railway Company* (3). For the reasons given in *Ridsdale* v. *Clifton* (4), and the authorities cited therein, it was contended that the direction of the rubric that the priest shall stand at the north side of the table is given with reference to a table standing either in the body of the church or in the chancel, and must be interpreted as applicable to a table in either position, and refers to that side of the table which faces towards the north.

Reference was also made on this subject to Cosin's Works, vol. 5, p. 458; Laud's Censure, Works, vol. vi. pt. i. p. 59; Stow Annals, 1552, p. 608; Heylin's Cypr. Anglic. p. ii. 244, 259; the Order of the Privy Council in Card. Doc. Annal. ii. p. 237; Prynne's Canterburies Doome, p. 78; Smart's Articles against Cosin, Cosin's Corresp. vol. i. pp. 161, 169; Lord Selborne on Liturgy of the English Church, pp. 57, 69, 70; Bishop Wren's Case, State Trials, 4th vol. pp. 27, 34, 103: see 18th article; Wren's Parentalia, pp. 14, 75, 103; Foxe's Book of Martyrs, Book IX. v. ii. p. 700; *Hutchins* v. *Denziloe* (5).

The singing of the hymn called the "Agnus Dei" was the next subject. The authorities are *Elphinston* v. *Purchas* (6); *Martin* v. *Mackonochie* (7). In *Clifton* v. *Ridsdale* (8), when it was before Lord Penzance, counsel admitted that the singing of the Agnus as alleged was unlawful, and declined to argue it. The singing of the Agnus at the period of the service in which it was sung was an illegal addition to or alteration of the service. The present Prayer Book directs that the reception of the elements should immmediately follow the Prayer of Consecration without let, break, or interruption, and by such singing there was caused

(1) 8 H. L. C. 391.
(2) [1891] A. C. 284, 292.
(3) 5 App. Cas. 826.
(4) 2 P. D. 276.
(5) 1 Hagg. Consist. 170.
(6) Law Rep. 3 A. & E. 98.
(7) Law Rep. 4 A. & E. 290.
(8) 1 P. D. 328.

a letting of the service forbidden by the book. Reference was made to Becon's Works, vol. iii. p. 278; Ridley's Articles of Visitations, 1 Card. Doc. Ann. 93.

With regard to what are called altar lights, it was contended that the burning on the Communion table of two candles (not required to give light) in broad daylight in connection with the Communion Service is an unlawful ceremony and an unauthorized addition to the rubric: see *Westerton* v. *Liddell* (1); *Martin* v. *Mackonochie* (2). One question in this case is whether the use of lighted candles during the Communion Service is lawful as a matter of ceremony; another, whether they are lawful ornaments. There is no rubric which deals with lights. As ornaments their lawfulness depends on the ornaments rubric and the section of the Elizabethan Act of Uniformity, which refers to what were in use by authority of Parliament in 2 Edw. 6, i.e., which were prescribed by the first Prayer Book, and these do not include either expressly or by fair implication lights not used for the purpose of giving light. As an unlawful ceremony, although a lighted candle by itself is not a ceremony, when used in the Communion Service it is a ceremony, because it is used as part of the service for the purpose of exciting the mind of the worshipper. Sir R. Phillimore held that such use was a ceremony, and his ruling was affirmed in Law Rep. 2 P. C. 365. Reference was also made to *Durst* v. *Masters* (3); *Sumner* v. *Wix* (4); 5th Cosin's Works, p. 441; Gorham's Reformation Gleanings, pp. 345, 346; Prynne's Canterburies Doome, pp. 62, 63, 123; Neale's History of Puritans, vol. ii. p. 9; *Hudson* v. *Tooth* (5). With regard to the Respondent personally, if the lighted candles were used with his sanction ceremoniously he would be responsible for a breach of ecclesiastical law. If they are to be viewed as church ornaments simply, the property in the candlesticks and candles being in the churchwardens, it was their province and not that of the bishop to put them out or remove them, and as the bishop could only compel them to perform their duty in this respect by

(1) Moore's Special Report.
(2) Law Rep. 2 A. & E. 116; S. C. 2 P. C. 365.
(3) 1 P. D. 373.
(4) Law Rep. 3 A. & E. 58.
(5) 2 P. D. 128.

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proceedings in his Court it was not contended in that case that he would be responsible.

Lastly, the archbishop was wrong in declining or omitting to pronounce any condemnation or formal declaration upon or against the respondent, even upon the articles which the archbishop found to be established and to the offences against the law; also in declining to make any order as to costs. The appellants had a right to have a monition issued on the findings come to by the Court below, and no reason had been given for refusing it: see *Martin* v. *Mackonochie* (1); and for form of decree, *Mackonochie* v. *Lord Penzance* (2); Coote's Practice, p. 255.

The respondent did not appear.

1892 *Aug.* 2.

The judgment of their Lordships was delivered by

LORD HALSBURY, L.C.:—

Before dealing with any of the specific charges which are the subject of the appeal, their Lordships think it right to notice an objection raised by counsel as to the legitimacy of some of the considerations by which the archbishop was influenced in arriving at his conclusions.

It has been urged that upon such subjects as the practice of the Primitive Church, the ritual of the Eastern and Western Churches, the position of the Lord's table, the position of the celebrant at the table, and like questions, which are ex hypothesi beyond the reach of living memory, the archbishop has consulted ancient authors, historical and theological works, pictures, engravings, and a variety of documents, of which undoubtedly any careful and competent historian would avail himself, but which it is argued cannot legitimately be made use of in a court of justice, and upon which it is said no judge is justified in placing any reliance in forming his judgment.

Where the objection is of so general a character, it is impossible to do more than apply to it a general treatment.

The first observation that arises is, that if our law were to exclude all such historical investigation as is pointed to by the

(1) 7 P. D. 94. (2) 6 App. Cas. 433.

objection, and questions of ritual and ecclesiastical practice could only be investigated by the light of the words of an Act of Parliament some centuries old, and by the testimony of living witnesses, it would disclose a very unreasonable and unsatisfactory state of the law.

Who can doubt that contemporaneous usage would be of incalculable value in forming a judgment on such subjects as are indicated above? And if no historical investigation can be permitted as to what was the contemporaneous usage, one source of light upon doubtful questions would be excluded.

The novelty of the objection urged before this Board is not a conclusive consideration, since the fact that an objection has not previously been taken is by no means conclusive against its validity when actually taken; but their Lordships cannot fail to be struck by the absence of any such objection in, e.g., *Ridsdale* v. *Clifton* (1), where not by counsel only, but in the judgment ultimately pronounced, such authorities as Hooker, Baxter's Life and Times, Collier's Ecclesiastical History, Dr. Thomas Bennett's Paraphrase, Cosin's Works, and the like, were quoted and relied upon; and this not upon questions of doctrine or opinion, but as leading to inferences of fact of what was usual at the time of the writers referred to.

But their Lordships are of opinion that the objection is founded upon an erroneous view of the law. Where it is important to ascertain ancient facts of a public nature, the law does permit historical works to be referred to.

The House of Lords upon the impeachment of Warren Hastings, having first determined that it would only proceed upon judicial evidence, such as would be receivable in a court of law, received in evidence (being advised, it will be remembered, by the judges) Cantemir's History of the Turkish Empire. In the case of St. Katharine's Hospital, Lord Hale admitted Speed's Chronicles to be evidence of a particular point of history in Edward III.'s time, and Pemberton, C.J., received the same evidence to prove the death of Isabel, queen dowager of Edward II., and said he knew not what better proof could be given.

Without considering further how far an ecclesiastical judge has a right to act upon his own historical learning, when it be-

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comes important to ascertain what was the ecclesiastical practice, or what were the views entertained by eminent theologians, in remote times, it is enough to say here, dealing with the objection generally, that it is impossible to contend that if in other respects the archbishop's judgment was well founded, it could be invalidated by his having called to his aid for this purpose his own historical researches.

Nor does it make the objection better that instead of pronouncing ex cathedrâ what in his opinion was the history of such and such a practice the archbishop has disclosed in his judgment the sources from which he derived his views.

With respect to some of the matters which have been the subject of debate in this appeal, it has been strongly urged that they have been conclusively determined by this board, and that if the facts are found to be the same no further argument is permissible. That question was raised in the case of *Ridsdale* v. *Clifton*. (1) Some of the points in issue in that case had been already the subject of decision by this Committee in the case of *Hebbert* v. *Purchas*. (2) In answer to the argument that they had been conclusively settled and were no longer open to discussion, Lord Cairns, in delivering the judgment of the Committee, said (3): "Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this tribunal between other parties, and an Order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. . . . In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. . . . Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation. Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules the

(1) 2 P. D. 276. (2) Law Rep. 3 P. C. 605.
(3) 2 P. D. 305.

stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders. On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject."

It was argued for the appellants that the doctrine thus laid down in *Ridsdale* v. *Clifton* (1) was only applicable where there was some "fresh light," and that by this was meant some fact which had not been under the consideration of the tribunal on the previous occasion. But an examination of the arguments and judgment shews that this was not the meaning of the Committee. They entered upon an elaborate and independent examination of the law bearing upon the legality of acts already pronounced illegal, and it was expressly stated, as their Lordships' conclusion, "that although very great weight ought to be given to the decision in *Hebbert* v. *Purchas* (2), yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and, if they should feel themselves forced to dissent from those reasons, to decide upon their own view of the law." In the result their Lordships dissented upon one point from the reasoning of the previous Committee, and came to the conclusion that an act was lawful which had been previously pronounced illegal. In the present case their Lordships cannot but adopt the view expressed in *Ridsdale* v. *Clifton* (1) as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law.

The first matter dealt with by the archbishop is that contained in the Fourth Article. That Article, when read with the Thirteenth and Fourteenth Articles, seems to contain, as the archbishop points out, two heads of charge. First, the mixing of the cup during the Communion Service, and secondly, the consecration

(1) 2 P. D. 276. (2) Law Rep. 3 P. C. 605.

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and administration of the mixed cup. With the former of these their Lordships need not concern themselves. The finding of the archbishop on this part of the charge was adverse to the respondent, and no question as to the legality of this act arises upon this appeal. As regards the latter head of charge, however, the archbishop declared that the act of consecrating wine which had been mixed with water before the service, and of administering the same when so mixed to the communicants, would not be offences against the ecclesiastical law of England. The appellants impeach this declaration, and ask their Lordships to pronounce the use of wine mixed with water in the administration of the Lord's Supper to be an ecclesiastical offence. The ceremonial mixing of the cup as part of the service is no longer in question; all that their Lordships have to consider is, whether the mere supply of wine which has some water in it, and the consecration and administration thereof in the Holy Communion, is a violation of the ecclesiastical law.

It is argued that the Prayer Book directs that "wine" is to be used for the purpose of the Sacrament, and that the rubric is not complied with if any water has been added to the wine which is so used. The argument must necessarily go the length of asserting that what is in that case consecrated and administered is not "wine." It is difficult to contend that what is generally called and known as "wine" loses that character by the admixture of a little water. Wines differ in alcoholic strength, and their Lordships do not believe that any one would hesitate to apply the word "wine" to such a mixture, or that it would be an unnatural use of language to do so. The responsive plea states that "a little water" was added, and it is not suggested that there was such an admixture as to cause the wine to lose its distinctive character as wine. It is to be observed that the word "wine" is applied in King Edward's first Prayer Book to the mixture of wine and water which that Prayer Book enjoined, and in the absence of any liturgical direction as to the alcoholic strength of the wine, their Lordships cannot think that the mere use of the word "wine" in the rubric by implication prohibited the presence of water in that which is consecrated and administered.

And their Lordships, after carefully weighing what was said

in *Hebbert* v. *Purchas* (1), are unable to see anything in the references to "wine" in any part of the rubrics inconsistent with this view. Lord Hatherley, in delivering the judgment of this Committee in *Hebbert* v. *Purchas* (1), said, that since it had been decided that the act of mingling wine with water in the service with a view to its administration is one of the additional ceremonies excluded by implication by the service for the Holy Communion, the question was whether the doing of the act before the service, and in the vestry or elsewhere, could so alter the symbolical character of the act that the cup might be brought in, and consecrated and administered to the people, without constituting an innovation or additional ceremonial act beyond what is ordered in the service. And after stating that whatever the admixture of water symbolised, it could scarcely be said that the reception of the mingled chalice had no share in this symbolism, but only the act of mingling, concluded that if the mingling and administering in the service water and wine was an additional ceremony, and so unlawful, it did not become lawful by removing from the service the act of mingling; but keeping the mingled cup itself and administering it.

Their Lordships find themselves unable to concur in this reasoning. The mixing of water with the wine in and as part of the service is no doubt a ceremonial act, and there can be as little doubt that, if so, it is an additional ceremony, quite apart from any particular idea as to its symbolical character which may induce the act. But where the chalice is placed mixed upon the Holy table, no act is done during the service, in addition to those prescribed; the acts of consecration and administration are precisely the same as if the chalice were unmixed, and the recipients may even well be ignorant whether the chalice be mixed or not. It seems to their Lordships that there is not in such a case any additional ceremony, that no ceremonial act is added to the service. The "removing from the service the act of mingling," which the judgment in *Hebbert* v. *Purchas* (2) treated as of no moment, is the removal of the very thing which as an added ceremony was unlawful.

If wine, with a small admixture of water, be "wine" within

(1) Law Rep. 3 P. C. 651. (2) Law Rep. 3 P. C. 605.

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the meaning of the rubric, and if the use of it does not involve an added ceremony, their Lordships cannot but agree with the archbishop that it does not become unlawful on account of any symbolism which has been attached to the use of the mixed chalice. The practice cannot be said to have received any general agreed or definite symbolical meaning at any period of the Church's history. And indeed the use of the mixed chalice, because Christ Himself is believed to have administered wine mingled with water, cannot with propriety be said to be a symbolical use of it, and yet this is the ground on which many have both advocated and defended the practice.

The use of the mixed chalice in primitive times is not denied. In mixing water with the sacramental wine the early Christians in all probability merely followed the practice which prevailed at that period, when, according to the ordinary usage, wine was not taken without some admixture of water, and when in ordinary parlance the word *οἶνος* was understood to include wine and water. Plutarch, writing at a period not very far removed from the time of the institution of the Lord's Supper, uses the phrase: *τὸ κρᾶμα, καίτοι ὕδατος μετέχον πλείονος, οἶνον καλοῦμεν.*

It is to be observed, however, that in the narrative of each of the gospel accounts of the institution itself, the "word" wine does not occur, but cup—*ποτήριον*—as also in St. Paul's reference to it in the First Epistle to the Corinthians.

There appear to have been three stages in the practice of the Church. At one time simple mixture of the wine with water. Then there appears to have been instituted an additional ceremony in which there was a ceremonial admixture but separate from the service; and then in later times an incorporation of the ceremonial admixture into the administration itself. It was to the latter, which was in use in their time, that the attention of our reformers was directed, and which they certainly intended to exclude.

Their Lordships consider that the archbishop accurately states the law when he says that the mixing of the wine in, and as part of the service, is against the law of the Church, but that the use of a cup mixed beforehand does not constitute an ecclesiastical offence.

The charge in the Eighth and Twelfth Articles seems to resolve itself into a question of fact.

It is not denied, but impliedly admitted by the bishop, that anything like the ceremony of ablution would be illegal.

The time at which the act was done is by the appellants themselves stated to have been after the Benediction, when, according to all ordinary understanding, as well as upon the true construction of the rubric, the service is at an end. The act itself is described by the bishop as having been done with the intention of complying with the direction of the rubric, reverently to consume what remained of the consecrated elements. Even if their Lordships should be of opinion that in the honest desire to comply with the direction in question the bishop exhibited excessive care and scruple in the mode in which he performed the prescribed duty, that certainly could not be construed to be an ecclesiastical offence.

The drinking of what the witness called to prove the facts describes as the "rinsings," does not suggest any ceremony, and their Lordships cannot think that what was done was intended to be anything but what it is alleged to have been, namely, a reverent consumption of the remnants of the consecrated elements in accordance with the Book of Common Prayer, or that there is any reason to regard it as an additional and, therefore, unlawful ceremony.

The appeal on this point therefore fails.

The Sixth Article and the Responsive Plea taken together establish that it was with the bishop's sanction that the hymn known as "The Agnus" was sung by the choir. The hymn, which was sung in English, consists of words taken out of the Bible, and unless there be something to make the singing of that particular hymn at the time alleged in the charge unlawful, the argument must go to the full extent of making all hymns or psalms sung during the service in the English Church an unlawful addition to such service.

With respect to this charge, the archbishop states that it was not contended before him that it is illegal to use a hymn or anthem in all places in the service where its use may not have been ordered, and practically the same concession was made here.

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It would indeed be difficult to maintain, in the face of usage ever since the passing of the Act of Uniformity, that singing a hymn at all during the service was in itself illegal. The careful research of the archbishop has established, as far as historical evidence can establish anything, that during the 17th and 18th centuries the practice was common, and it has undoubtedly continued to our own time. Such universal and unbroken usage is of great force, and it would in their Lordships' opinion be impossible now to contend that in itself, and apart from any interference with the due order of the service or anything objectionable in the hymn sung, the practice is illegal.

Whether the origin of the usage is the permission given by 2 & 3 Edw. 6, c. 1, s. 7, "to use openly any psalms or prayer taken out of the Bible, at any due time, not letting or omitting thereby the service or any part thereof mentioned in the said Book," it is immaterial now to inquire. The charge is that the hymn was sung "before the reception of the elements." This is admitted in the Responsive Plea. But the archbishop did not understand it as alleging that the celebrant waited till the end of the hymn before he and others received the elements. No evidence was given on the point, and the archbishop's construction was not questioned before their Lordships. No case of "letting" any part of the service, therefore, was made out against the respondent. With reference to the provision in the statute that the psalms must be used at a "due time," it is noteworthy that the "Hymns and Songs of the Church" by Wither, licensed by James I. and Charles I. in succession, should contain, in connection with a hymn inserted therein, a statement that "We have a custom among us, that during the time of administering the Blessed Sacrament of the Lord's Supper, there is some Psalm or Hymn sung the better to keep the thoughts of the communicants from wandering after vain objects." Considering the ordinary mode in which the sacrament is administered to each communicant, and the number who may either have received or be waiting to receive the elements, their Lordships cannot differ from the archbishop that it was a "due time" for singing a hymn.

If hymns and anthems are lawful at this point in the service,

it cannot be said that the "Agnus Dei" is otherwise than appropriate. Although the words are not in their combination taken out of Scripture, they combine two separate passages of Scripture and are found in more places than one in the Book of Common Prayer. They have direct reference to the great event commemorated in the sacrament, and they are not likely to be abused to any kind of idolatrous adoration, except by those who would make for themselves other opportunities for it.

It is quite true that they were omitted from this part of the service in 1552, but other omissions were made at the same time which it was not suggested could have had any doctrinal significance.

The ninth charge is founded upon an alleged disobedience to that part of the rubric prefixed to the Communion Service, which is in these words:—

"The Table, at the Communion-time having a fair white linen cloth upon it, shall stand in the Body of the Church, or in the Chancel, where Morning and Evening Prayer are appointed to be said. And the Priest, standing at the North-side of the Table shall say the Lord's Prayer, with the Collect following, the people kneeling."

The charge as formulated sufficiently shews what is intended to be charged as illegal, though it is true, as pointed out by the archbishop, that the particular illegality is not definitely stated. The words at the end of the Ninth Article "and not on the north side thereof" sufficiently shew what the pleading meant, i.e., that the standing on the west side of the table during the whole of that part of the service which intervenes between its commencement and the ordering of the bread and wine before the Prayer of Consecration is illegal, and an offence against the Act of Uniformity.

Before discussing the matter in its relation to the express words of the rubric, their Lordships cannot forbear from observing that it is impossible to assign to the directions in the rubric any meaning, either positively or negatively, which touches matters of doctrine. Whatever the position of the priest may be, it is the same whether there is or is not a celebration of the Lord's Supper, and the rubric immediately before the Prayer for

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the Church Militant shews that what is described as the Communion Service may be used, at least that the part of it down to the end of that prayer may be used, without the celebration of the Lord's Supper at all. This is also plain from the first rubric at the end of the entire service.

The question is therefore, by the form of the charge, whether the position of the respondent, on the occasion to which the charge relates, constituted an ecclesiastical offence.

It is difficult to understand the importance which has been attached by the appellants to the position of the priest during the early part of the Communion Service. It appears to be suggested that the eastward position at the holy table is significant of the act of the priest being a sacrificial one. The archbishop has pointed out that in his opinion this view is erroneous; but quite apart from this, if there be any such significance in the position of the officiating priest, and if the intention of those who framed the rubrics now in force was to prohibit a position which could be interpreted as indicating a sacrificial act, it is obvious that the prohibition would have been specially aimed at the position during the consecration of the elements. Yet it has been decided by this Committee, and the appellants did not seek to impeach the decision, that the celebrant may at that time stand at the middle of the table facing eastwards. If this be lawful, of what importance can it be to insist that he shall during the two prayers with which the service commences place himself at that part of the table which faces towards the north? And this is all that is now in controversy. The point at issue has been sometimes stated to be whether the eastward position is lawful, but this is scarcely accurate. Even if the contention that the priest must stand at that part of the table which faces northward were well founded, there is nothing to make his saying the Lord's Prayer and the opening Collect with his face eastward unlawful; the only question is whether he can lawfully do so when occupying a position near the north corner of the west side of the table. Of what moment is it, or can it ever have been, to insist that he should, during the two prayers with which the service commences, place himself at that part of the table which faces towards the north, if it be lawful to stand at

the middle of the table facing eastward during the Prayer of Consecration? The very necessity of occupying the position which it is contended is alone legal during the early part of the service would serve to emphasise the subsequent change of position, and to render the position assumed at the time the elements are consecrated the more significant.

In their Lordships' opinion, there can be no doubt that at the period when the rubric in question was framed, the table was, at the time of the Holy Communion, placed in almost all parish churches lengthwise in the body of the church or chancel, the smaller sides or ends facing east and west, and the longer sides north and south, when the church stood, as it ordinarily did east and west. And there can be as little doubt that the rubric was framed with reference to this position of the table. Whilst the table stood in this position and the priest could comply conveniently with all the directions of the rubrics, without assuming a position at any part of the table other than that prescribed at the commencement of the service, there would be no reason for any change of position. When at a later period the holy table came to be placed, what has been termed altarwise, a controversy unquestionably arose as to the manner in which the rubric ought to be complied with. Those who were in favour of the change to the altarwise position insisted that the rubric was complied with if the priest stood at the north end or side of the table. The Puritan party, on the other hand, who objected to the change, insisted that it rendered compliance with the directions of the rubric impossible, inasmuch as the priest could not stand on the north side of the table, neither of the "sides" according to their view facing the north. This controversy was still being carried on when the Prayer Book now in use came into force; but the rubric prescribing the position of the priest at the commencement of the Communion Service was left unaltered in its terms, and no attempt was made to solve the controversy. Subsequently to this period the position at the north end or side of the table appears to have become the common, though not, perhaps, absolutely the universal one, there being reason to believe that a position at the northern side of that part of the table which faces westward was

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sometimes assumed. When the question came to be discussed before this Board in the case of *Ridsdale* v. *Clifton* (1), Dr. Stephens, the leading counsel who appeared for the promoters of the suit, still argued that the Acts of Uniformity required that at Communion time the Lord's table should stand with its ends east and west, thus providing a side to the north at which the priest is to stand and officiate. It is to be observed that the only question which had to be decided, either in *Hebbert* v. *Purchas* (2) or *Ridsdale* v. *Clifton* (1), was whether the clergymen against whom these suits were brought had occupied an unlawful position by standing at the middle of the west side of the Communion table whilst saying the Prayer of Consecration. It is true that opinions were expressed as to the position which it was the duty of the clergyman to occupy during the earlier part of the service. But these expressions of opinion were dicta not necessary for the decision of either of those cases, in which opposite views were taken as to the legality of the position occupied during the Prayer of Consecration. The question whether it is an ecclesiastical offence to stand, whilst saying the two prayers with which the service commences, elsewhere than at the north end had not then to be determined, and it must be remembered that the observations in the judgment in *Ridsdale* v. *Clifton* (1) were, in some measure at least, directed to the argument, to which reference has been made, that the table must during the administration of the Communion stand lengthwise east and west. Their Lordships, in *Ridsdale* v. *Clifton* (1), expressed the opinion that where the minister is directed to stand at the north side of the table, it is his duty to stand at the side of the table which, supposing the church to be built in the ordinary eastward position, would be next the north, whether that side be a longer or shorter side of the table. It will be observed that, although the only direction in the rubric has reference to a particular point of the compass, their Lordships did not consider that the obligation to stand at the commencement of the Communion Service facing southwards was absolute. They interpreted the rubric with reference to the fact that Churches, at the time the rubric was framed, generally stood

(1) 2 P. D. 276. (2) Law Rep. 3 P. C. 605.

east and west. It seems equally legitimate to have regard to the usual position of the table as having been then in contemplation, and there can be, as has been pointed out, no doubt that this was lengthwise in the body of the church, the ends facing east and west. It is true that a quadrilateral, whatever its form, is rightly described as having four sides, and the word "side" may without impropriety be applied to each of them. But it is obvious, from the arguments which were common at the time when the table began to be placed in what has been called the altarwise position, that the word "end" was then as now more usually employed than the word "side" to describe the shorter sides of the quadrilateral.

Their Lordships are of opinion that, even assuming that what would be more commonly spoken of as "ends" may properly be called "sides," yet where a position at the "north side" was enjoined by the rubric, one of the longer sides of the table was in contemplation, and it was also in contemplation that all the acts prescribed which were to be done at the table should be done at that side.

When the terms of the rubric are considered, in connection with the circumstances existing at the time it was framed, their Lordships consider that it cannot be regarded as so definitely and unequivocally enjoining that the priest shall, no matter how the table may be placed, stand at that end of the table which faces the north when saying the opening prayers that no other position can be assumed without the commission of an ecclesiastical offence. They cannot think that it renders it obligatory on a clergyman who thinks it desirable during the Prayer of Consecration to stand at the side of the table which now ordinarily faces westward to stand during the earlier part of the service at a different part of the table. Their Lordships are not to be understood as indicating an opinion that it would be contrary to the law to occupy a position at the north end of the table when saying the opening prayers. All that they determine is that it is not an ecclesiastical offence to stand at the northern part of the side which faces westwards.

In dealing with the charge relating to lighted candles on the Communion table, it becomes necessary to consider with care

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the allegations actually made and the proofs in reference to the allegations.

The offence is alleged to have taken place in the church of St. Peter-at-Gowts on the 4th of December, 1887, and the charge in the 3rd Article is that the bishop, "when officiating as Bishop and the principal celebrant in the Service for the administration of the Holy Communion in the same church used, and permitted to be used, lighted candles on the Communion Table, or on a ledge immediately over the said Table so constructed as to appear to form part of the said Communion Table, during such Service as a matter of ceremony, and when such lighted candles were not required for the purpose of giving light."

The 13th Article alleges,—

"That the use of the lighted candles" . . . . is an "unlawful addition and variation from the form and order prescribed . . . . by the said Statutes and of the order of the administration of the Holy Communion . . . . and . . . . contrary to the said statutes and to the Rubrics . . . . and to the . . . . canons."

The Responsive Plea 2 of the bishop is that "throughout the celebration there were without any objection being raised by him two lighted candles on the Holy Table. These lights whether required for the purpose of giving light or no, are in his judgment and he submits lawful." All that is here admitted is that two candles were, without objection on the part of the bishop, alight throughout the celebration on the holy table. And the only fact added by the proof was that they were not required for the purpose of giving light.

The allegation that the candles were used as a matter of ceremony is an essential averment in any view of the offence indicated by the charge. It is not charged that there was any act of lighting or carrying lights about, nor was there any evidence of their use as a matter of ceremony, unless it be afforded by the mere fact that they were alight during the Communion Service.

If the proof corresponded with the allegation in all respects, it would be matter for grave consideration how far the archbishop's elaborate exposition of the history of the question, and in particular the decision of two learned judges in 1628 and

1629, have afforded new materials for consideration since the decision of this Board in *Martin* v. *Mackonochie* (1) upon the same subject; but their Lordships are unable to see that the charge against the bishop raises the same question. The charge against Mr. Mackonochie, who was himself responsible for the arrangement of the service and for the ornaments in his church, was presented under two aspects, and this Board dealt with both:—The ceremonial lighting and burning of the candles when light was not required, and the placing and keeping the candles as unlawful ornaments on the Lord's table. It is important to bear in mind the commentary made in that case upon the utterance of the Council of Trent, De Missæ Ceremoniis et Ritibus:—

"Cerimonias item adhibuit ut mysticas benedictiones, lumina, thymiamata, vestes, aliaque multa."

In commenting upon this it was said by this Board (2):—

"There is a clear and obvious distinction between the presence in the church of things inert and unused, and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candlestick may be part of the furniture or ornaments of a church, but the censing of persons and things, or, as was said by the Dean of the Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the Eucharist, the symbolical use of water in Baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation, and symbolical use of the torch or candle; these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as part of a ceremonial law."

Their Lordships are not able to attach any definite meaning to the phrase that the respondent was officiating as bishop. If it is sought to be argued that his position as bishop made any difference in his responsibility from that which would attach to any other clergyman not being the incumbent, their Lordships are not prepared to adopt such a view. The act of lighting candles, or keeping them alight, the placing or maintaining

(1) Law Rep. 2 P. C. 365.

(2) Law Rep. 2 P. C. 387.

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ornaments, are all things for which the incumbent of the church is himself responsible, and their Lordships in the case of *Martin* v. *Mackonochie* felt themselves compelled to deal with the questions whether there had been a ceremonial use of the lights, and whether unlawful ornaments had been in use. It was on the latter ground mainly that the judgment against the respondent was rested. No such question arises here; the bishop is not charged, and manifestly could not be, with introducing unlawful ornaments. If he had disapproved of the existence of the lights where they were placed, he would have had no power to remove them; and, where no act of lighting, cremation, or actual use is proved, it is impossible to say that the ecclesiastical offence has been established of using a ceremony not retained, and therefore prohibited, by the Act of Uniformity, unless the mere fact that the bishop took part in the consecration and administration of the elements, whilst the lights were burning, constituted of itself the use by him of such a ceremony. No act was done by the bishop which conveyed, or was calculated to convey, to the minds of those present any different idea from that which would have been conveyed had the lights been absent. Their Lordships are not prepared to hold that a clergyman who takes any part in the celebration of divine service in a church in which unlawful ornaments are present necessarily uses them as a matter of ceremony.

Doubtless acts done by a person primarily responsible may be so aided and assisted by others that the persons thus aiding and assisting become parties to the transaction, and as guilty as the principal; but no such case has been, in their Lordships' opinion, established here. There is no allegation or evidence that the bishop was a party to or a participant in the original lighting and placing the candles where they were placed, and the only alternative open to a clergyman, under the circumstances of this case, whatever his own views, and whatever his rank in the Church, would be to refuse to join in the administration of the sacrament of the Lord's Supper to the congregation because there was a light burning when no light was necessary. Whatever view might be entertained as to the propriety of such a course being taken, their Lordships are unable to affirm that the not taking

such a course makes the bishop so far responsible for the act of the incumbent in lighting and keeping alight the candles as to establish the charge contained in the 3rd Article.

The bishop's responsive plea, in which he submits that the existence of the two lighted candles on the table throughout the celebration is lawful, and in which he admits that he made no objection, does not add anything to the case made against him. No authority was cited to shew that his not making such objection constitutes an ecclesiastical offence, and their Lordships are of opinion that it does not.

Finally, it is necessary to say that their Lordships do not concur in the suggestion made at the bar that upon those parts of the case as regards which an ecclesiastical offence was found to be proved, the archbishop was under a legal obligation to issue a monition. The promoters of a suit have, it is said, a right, where they have succeeded in establishing a breach of the law, to insist upon sentence being pronounced, even if it be only a monition not to repeat the offence. Their Lordships are of opinion that the promoters have no such right. If the archbishop has satisfied himself that the offence will not be repeated, he is entitled to accept the assurance of future submission, and is not bound to inflict a penalty, and a monition is a penalty.

In the result, their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Solicitors for appellants: *Wainwright & Baillie.*

[HOUSE OF LORDS.]

H. L. (E.)
1892
March 28.

JUAN JOSE DE LA TRINIDAD CONCHA (PAUPER) . . . . . } APPELLANT;

AND

MANUEL ANTONIO CONCHA AND ADELINDA CONCHA . . . . . } RESPONDENTS.

Practice—Appellate Jurisdiction Act 1876: *Standing Order I.—Appeal to House of Lords—Time for Appealing.*

By No. I. of the Standing Orders of the House of Lords, applicable to all appeals presented on or after the 1st of November 1876, it is ordered that "except where otherwise provided by statute no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment or interlocutor appealed from."

Under this Standing Order when an appeal lies from an order of the Court of Appeal made within the year, this House can in some cases entertain an appeal from a previous order of the Court of Appeal made more than a year before; no definite rule can be laid down; each case must be judged by its own circumstances.

By LORD MACNAGHTEN:—When there is a competent appeal from an order made within the year, there is nothing in the Standing Orders or in the practice of the House in regard to appeals to prevent the House from entertaining an appeal from a previous order which is so connected with the later order as properly to form the subject of one and the same appeal, if the previous order is in an appealable condition, if it does not belong to a stage in the proceedings which has been definitely passed, or to a chapter in the litigation which may fairly be regarded as closed, and if it is clear that the appeal will not lead to additional inquiries and further expense.

The decision of the Court of Appeal (40 Ch. D. 543) varied, a different view being taken of the facts.

APPEAL from an order of the Court of Appeal dated the 15th of February 1889, also from an order of that Court dated the 2nd of July 1887 and an order of Stirling J. dated the 29th of April 1887. The decision of the 15th of February 1889 is reported in 40 Ch. D. 543.

Juan José Concha, a widower domiciled at one time in Peru and afterwards in Chili, died in 1860 leaving an only child, the respondent Adelinda. By the law of Peru as well as that of

Chili all property acquired during coverture by the husband or wife (with certain exceptions not material to mention) is regarded as community or partnership property and called "ganancial" property, and on her mother's death Adelinda became entitled to one-half of that property existing at her mother's death, after satisfaction of her parents' debts. After Juan's death the suit of *De Mora* v. *Concha* was brought for the administration of Juan's estate and a decree made. In 1884 an inquiry was directed (inter alia) as to the amount of the community or partnership property of Adelinda's father and mother and as to the share to which Adelinda was entitled by the laws of Peru and Chili. The Chief Clerk's certificate in answer was varied by an order of Stirling J. dated the 29th of April 1887. That order was varied by the order of the Court of Appeal dated the 2nd of July 1887.

In 1886 an inquiry was directed whether Juan was by the law of Peru entitled to sell any and if any what part of certain Peruvian bonds forming part of the ganancial property and sold by him in 1855, and whether any and if any what compensation was due from his estate to Adelinda and her husband (the other respondent) in her right in respect of the sale. Two certificates of the Chief Clerk in answer were varied by an order of Stirling J. dated the 4th of August 1888, and that order was varied by the order of the Court of Appeal dated the 15th of February 1889. That Court was of opinion that the circumstances of the sale did not justify it according to the law of Peru, and framed their order accordingly (1). The present appeal was brought by the appellant as representing Juan's estate.

At the hearing no dispute was raised on the point as to the evidence of foreign law decided in the Court of Appeal, and their Lordships examined and considered the meaning of those passages in the Code of Peru which were referred to by the advocates who had given evidence as to the law of Peru, the appellant's counsel agreeing that their Lordships were undoubtedly entitled to do so. The questions upon which the Court of Appeal varied the orders of Stirling J. were questions of fact. The only point of law raised in the appeal was as to

(1) 40 Ch. D. 543.

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the competency of the appeal. The appeal was heard on several days in November 1891 when

Fischer Q.C. (*Rigby* Q.C. and *D. Stewart Smith* with him) for the respondents took the objection that under No. I. of the Standing Orders of the House of Lords no appeal lay from the order of the Court of Appeal dated the 2nd of July 1887, that order having been made more than a year before the appeal was brought. He cited *Beavan* v. *Mornington* (1); *Aldborough* v. *Trye* (2); and *Curtis* v. *Sheffield* (3).

Sir *Horace Davey* Q.C. (*Brice* Q.C. and *R. Woodfall* with him) for the appellant contended that the words of the Standing Order "the date of the *last* decree, order" &c. clearly contemplated an appeal in some cases from an order made more than a year before the presentation of the appeal, when an order made within the year is also appealed from, and that in this case the two orders were so connected together that the appeal from the later order could not be dealt with properly without hearing the appeal from the earlier order. He cited *De Burgh* v. *Clarke* (4), *Attwood* v. *Small* (5), and *Phillips* v. *Fothergill* (6).

Their Lordships without deciding the point of law heard the appeal fully on the merits and took time for consideration.

1892. March 28. LORD HALSBURY L.C. [after discussing the questions of fact raised, came to the conclusion, with regard to the sale of the Peruvian bonds, that upon the evidence the sale was justifiable and prudent, and that if the sale had not been made there would probably have been no property to dispute about. Upon the question of the competency of the appeal, his Lordship said:—]

My Lords, the ganancial property, whatever it was, was finally ascertained by the order of the Court of Appeal of the 2nd of July 1887, and it is objected that inasmuch as more than a year has elapsed from the date of the order before the presentation of the appeal to the House, the appeal is out of time. That ques-

(1) 8 H. L. C. 525.
(2) 7 Cl. & F. 436.
(3) 21 Ch. D. 1.
(4) 4 Cl. & F. 562.
(5) 6 Cl. & F. 232, 309.
(6) 11 App. Cas. 466.

tion cannot be decided on a bare statement of dates. It must depend upon what the order is, and how far it may be connected with an order which is legitimately under appeal, and I hesitate for that reason to give any final opinion on the subject. It is an opinion which would regulate no other case.

LORD MACNAGHTEN [after stating the facts, proceeded as follows]:—

My Lords, the questions raised by the present appeal are in substance these:—

1. What did the ganancial property consist of at the time of the death of Adelinda's mother?

2. How has the ganancial property been dealt with, and what is now due to Adelinda in respect of her share therein?

There is, however, a preliminary point as to the competency of the appeal. It is contended by the respondents that in regard to the first question the appeal is out of time, as the order of the Court of Appeal from which the appeal is brought was made more than a year before the petition of appeal was presented to this House.

The inquiries directed with the view of determining both questions are to be found in an order of the 19th of July 1884, made in the suit of *De Mora* v. *Concha*, to which an addition was made by an order of the 26th of October 1886. At the request of the parties the Chief Clerk made a separate certificate of his finding as to the amount of the ganancial property. This finding was varied by Stirling J., and the order of Stirling J. was again varied by the Court of Appeal on the 2nd of July 1887. The petition of appeal to this House was not presented until the 5th of July 1889. The learned counsel for the respondents did not go so far as to contend that no order which has remained unchallenged for a year can be brought up for appeal. But they said, and said truly, that the Chief Clerk's certificate as settled by the Court of Appeal was a finding upon a distinct and separate issue of fact which may well stand, whether the rest of the appeal succeeds or fails, and that your Lordships are perfectly free to deal with each and all of the points involved in the second question, without disturbing the finding upon the first. And

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their contention was that no order more than a year old can be brought up for appeal, unless it would prevent the House from doing justice between the parties in dealing with an order appealed from in due time. But that condition is not to be found in the Standing Orders of 1876, which regulate appeals to this House. All that the Standing Orders say is that no petition of appeal is to be received unless it be lodged within one year from the date of the last decree, order, judgment or interlocutor appealed from. These orders certainly contemplate the admissibility of appeals brought from orders more than a year old in conjunction with an appeal from an order made within the year. They do not prescribe the conditions under which such appeals are admissible. Each case, therefore, must, I think, be judged by its own circumstances. On behalf of the appellant it was said that on an appeal brought in proper time from an order on further consideration, the appellant may bring up for review any previous order upon which the order on further consideration is founded, if the previous order has been made after decree and is in an appealable condition—that is to say, if the order has been taken to the Court of Appeal, from which alone appeals to this House are entertained; and then upon that assumption it was argued that there can be nothing irregular in bringing up together two orders intended as the foundation for the order on further consideration if the last of those two orders has been made within the year. I rather hesitate to adopt the argument of the learned counsel for the appellant to its full extent. I think it would be opening too wide a door for appeals. If, for instance, in the present case an order had been made on further consideration, and that order were now under appeal, I doubt whether your Lordships would entertain an appeal from the order declaring the validity of the marriage between Adelinda's parents. It seems to me that that question must be taken to have been finally settled when the order was left unchallenged for a year, and the parties went on with the other inquiries which were only relevant if the marriage was valid. I will not attempt to define what the Standing Orders of this House have left undefined. I will only say this, that in my opinion, when there is a competent appeal from an order made within the year, there is nothing in

the Standing Orders or in the practice of the House in regard to appeals to prevent your Lordships from entertaining an appeal from a previous order which is so connected with it as properly to form the subject of one and the same appeal—if the previous order is in an appealable condition—if it does not belong to a stage in the proceedings which has been definitely passed, or to a chapter in the litigation which may fairly be regarded as closed, and if it is clear that the appeal will not lead to additional inquiries and further expense. Tried by these considerations, the present appeal as to the amount of the ganancial property seems to me to be unobjectionable, and I think it ought to be admitted.

[His Lordship then discussed the merits of the appeal from the order of the 2nd of July, 1887. With respect to the question of the sale of the Peruvian bonds, he observed as follows:—]

The Court of Appeal has held that the sale was a breach of trust on the part of Concha, and that his estate is liable for the highest value which the bonds subsequently reached in the market. Stirling J., on the other hand, held that Concha was accountable only for the 62,000 pesos. It is not necessary to enter into a discussion on Peruvian law (the evidence as to which is not altogether satisfactory), because it is admitted on all hands that the sale was justified if the circumstances were such that a prudent father of a family in Concha's position would have sold the bonds as he did. I am satisfied upon the evidence that Concha's property in Peru was in great peril at the time. It would all have been confiscated if the Government could have put their hands upon it. An application to the Peruvian Courts for their sanction to the sale would have enabled the Government to trace the property. I am, therefore, of opinion that the sale was justified, and that the method of sale was justified too. I may add that I think that there is, perhaps, some danger of doing injustice if the strict rules which the English Court of Chancery has applied to dealings with trust property are applied to a case between foreigners under foreign law whose relations are not exactly those of trustee and cestui que trust. Upon this point, therefore, I think that the order of Stirling J. should be

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restored, except as to the date from which interest is to be computed.

LORD HANNEN concurred.'

On the 1st of August the cause was spoken to on the minutes, and eventually the Order was drawn up to the following effect:—

Order of the Court of Appeal of the 2*nd of July* 1887, *Order of the Court of Appeal of the* 15*th of February* 1889, *and Order of Stirling J. of the* 4*th of August* 1888, *varied in several particulars: Cause remitted to the Chancery Division.*

Lords' Journals 1st August 1892.

Solicitors for appellant: *Darley & Cumberland.*
Solicitor for respondents: *Worthington Evans.*

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1892, will be as follows:—

In the First Series,
[1892] 1 Ch. [1892] 2 Ch. [1892] 3 Ch.

In the Second Series,
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In the Third Series,
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BANKER—*Negotiable Securities—Deposit of Securities by Broker—Authority of Broker to Pledge—Pledge of Securities without Authority—Holder for Value and in Good Faith.*] A person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who had none.—A broker in fraud of the owner pledged negotiable instruments together with other instruments belonging to other persons with a bank as a security en bloc for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded the bank realized the securities:—*Held*, reversing the decision of the

BANKER—*continued.*
Court of Appeal ([1891]) 1 Ch. 270), that there being as a matter of fact no circumstances to create suspicion the bank was entitled to retain and realize the securities, having taken negotiable instruments for value and in good faith.—The decision of this House in *Earl of Sheffield* v. *London Joint Stock Bank* (13 App. Cas. 333) turned entirely upon the special facts of that case. LONDON JOINT STOCK BANK *v.* SIMMONS [201

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2. —— *Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9 *and Schedule—Names and Description of Parties—Address of Attesting Witness—Payment by Instalments.*] In a bill of sale the

BILL OF SALE—*continued.*
grantee was described as "The Discount Bank of London of 6 Duncannon Street Charing Cross (of which said bank Lewis Simmons of the same place is sole proprietor)." The assignment of the chattels was to "the said bank and its assigns" and Lewis Simmons was not again mentioned in the bill. The grantor agreed to pay the said bank the principal sum (£500) together with the interest then due "by monthly payments of £30 on the 18th day of every month." The bill was attested by W. G. C. "Clerk to the Discount Bank of London 6 Duncannon Street Charing Cross," at which address he was employed as clerk. In the affidavit of execution of the bill filed with the bill the attesting witness stated that he resided at another address. The chattels having been seized by Simmons for default of payment objections to the bill of sale were raised by a creditor on the ground that the description of the grantee was ambiguous and insufficient; that the address of the attesting witness was either not given at all or was incorrect; that the amount of the last instalment (being less than £30) was not accurately stated; and that the bill of sale not being in accordance with the form given in the schedule to the Bills of Sale Act 1882 was void:—*Held*, that the objections were all groundless; that the grantee was sufficiently described; that the address of the attesting witness was given and was sufficient; and that the provision for payment of instalments followed the form given in the schedule.—The decisions of North, J. and of the Court of Appeal ([1891] 1 Ch. 464) reversed. SIMMONS *v.* WOODWARD - - - **100**

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BOND—*continued.*
to have been extended beyond the penalty to the prejudice of a subsequent incumbrancer; that there was obviously in the decree of 1853 an error arising from an accidental omission, and that under Order XXVIII. r. 11 of the Rules of the Supreme Court (Ireland) 1891 the decree should on a proper application be corrected by inserting the words "the principal sum and interest not to exceed the amount of the penalty on the bond."—The decision of the Irish Court of Appeal (27 L. R. Ir. 512) affirmed. HATTON *v.* HARRIS - - - - - **547**

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CONSPIRACY—*Combination to keep up Freights—Contract in Restraint of Trade—Illegal Contract—Engrossing particular Trade—Exclusion of Rival Traders from Combination.*] Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices.—The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs:—*Held*, affirming the decision of the Court of Appeal (23 Q. B. D. 598), that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action. Mogul Steamship Company *v.* McGregor, Gow & Co. - - - - - - 25

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See Practice—House of Lords.

CROWN— *Prerogative — Treaties — Interference with Private Rights—Acts of State.*] *Quære*, whether the Crown has the power of compelling its subjects to obey the provisions of a treaty made either for the purpose of putting an end to war or to preserve peace, or, whether interference with private rights can be authorized otherwise

CROWN—*continued.*
than by the legislature.—Where the Government justified certain acts in derogation of the private rights of the plaintiff in regard to his lobster fishery, as acts and matters of State arising out of political relations between Her Majesty and the French Government contending that they involved the construction of treaties and of a temporary modus vivendi for lobster fishing in Newfoundland and other acts of State, and that they were matters which could not be inquired into by the Court:—*Held*, that this defence disclosed no answer to the action. WALKER *v.* BAIRD - - - - - - 491

—— Prerogative of—Provincial Government of British North America - - 437
See PRIVY COUNCIL APPEALS—CANADA. 2.

CROWN FIEFS—Law of Jersey - - 402
See PRIVY COUNCIL APPEALS—JERSEY.

CUSTODY OF CHILDREN—Paternal rights 425
See PRIVY COUNCIL APPEALS—CANADA. 4.

DAMAGES — *Detinue — Detention of Cargoes—Possession by Consent—Possession by Receiver—Inquiry as to Damages—Damages by Detention—Damages Due to the Law's Delay—Principle of working out Inquiry—Chief Clerk's Certificate, Variation of—Wrongdoer entitled to Deduct Expenses from Value of Goods Detained.*] In an action in the Chancery Division the plaintiffs claimed delivery of cargoes of guano, an injunction to restrain the defendants from delivering otherwise than to the plaintiffs, and the appointment of a receiver. The defendants, who claimed the right to the cargoes, after the issue of the writ took possession of them under a consent order by which it was agreed that the receipt of the cargoes by the defendants should be "without prejudice to any question between the parties, and that they would keep separate accounts of their expenditure and receipts in respect of the cargoes, and abide by any order the Court shall make with respect to the cargoes." An order for the appointment of a receiver was afterwards made, and to the receiver when appointed the defendants delivered the unsold cargoes and the proceeds of the cargoes they had sold. The action was defended on the ground that the cargoes were not the property of the plaintiffs. At the hearing Bacon, V.C., made a decree declaring that the plaintiffs were entitled to the cargoes, and that the defendants were not entitled to reimbursement of any expenses, and directing an inquiry "what damages had been sustained by the plaintiffs by reason of the detention of the cargoes by the defendants." On appeal this House having regard to the terms of the consent order varied the decree by declaring that the defendants were entitled to receive out of the proceeds of the cargoes payment of all sums properly disbursed by them on account of freight and landing charges, and otherwise affirmed the decree. Upon the inquiry as to damages the chief clerk found that the detention began on the arrival of the cargoes respectively at their ports of discharge, and computing the damages on the principle that the

DAMAGES—*continued.*
illegal detention continued until the decree of Bacon, V.C., allowed interest at 5 per cent. upon the proceeds of the cargoes until the decree, less the interest gained in Court and paid in by the receiver. Upon a summons to vary the chief clerk's certificate:—*Held*, that the former decision of this House was consistent with the order for the inquiry as to damages; that the consent order did not convert an unlawful into lawful detention, but that after the order for the appointment of a receiver the cargoes were in the possession of the Court and any damages suffered by the plaintiffs were due to the law's delay and not to any wrongful act of the defendants; that interest at 5 per cent. ought therefore to be allowed until the order for the appointment of a receiver but not after. The decision of Kay, J. (42 Ch. D. 66) and of the Court of Appeal (43 Ch. D. 316) varied accordingly.—By Lords Watson and Macnaghten:—On general principles and independently of the terms of the consent order the defendants though they had illegally detained the plaintiff's property were entitled to repayment of the expenses properly incurred by them on account of freight and landing charges (See pp. 173, 186). PERUVIAN GUANO COMPANY *v.* DREYFUS BROTHERS & CO. - 166

—— Measure of—Trespass on land in Samoa 75
See PRIVY COUNCIL APPEALS—PACIFIC ISLANDS.

DEATH—Injury to workman resulting in death —Action by mother—Scotch law 576
See SCOTCH LAW. 2.

—— Without leaving children - - 342
See WILL.

DETINUE — Detention of cargo — Measure of damages - - - - 166
See DAMAGES.

DEVIATION—Statutory powers - - 498
See WATERWORKS.

EASTWARD POSITION—Church ceremonies 644
See ECCLESIASTICAL LAW. 2.

ECCLESIASTICAL LAW — *Advowson*—13 *Anne, c.* 13—*Nomination by Roman Catholic Patron—Void Presentation.*] *Held*, that a presentation to a benefice made by a college, on the nomination of a Roman Catholic patron, and appearing on the face of it to have been made, not in right of the college, but in trust for the Roman Catholic, was absolutely void under 13 Anne, c. 13. BOYER *v.* BISHOP OF NORWICH - - 417

2. —— *Bishop—Communion Service—Lighted Candles—Administration of Mixed Chalice—Eastward position—Singing of Hymn "Agnus Dei"—Rule as to Evidence of Historical Facts—Finality of Privy Council Judgments.*] Where it is important to ascertain ancient facts of a public nature, the law permits historical works to be referred to as evidence thereof.—The rule of finality applicable to decisions of the Privy Council in relation to rights of property is not equally binding as regards decisions which relate to ritual and ecclesiastical practice and depend to some extent upon the accuracy of historical investigation:—*Held*, affirming the judgment of the archbishop, that, although the mixing of

ECCLESIASTICAL LAW—*continued.*
wine with water in and as part of the Communion service is against the law of the Church, yet that the use of a cup mixed beforehand does not constitute an ecclesiastical offence:—*Held*, that the choir's singing of the hymn "The Agnus" before and during the reception of the elements is not illegal:—*Held*, that the priest's standing at the northern end of the west side of the table during the whole of that part of the Communion service which intervenes between its commencement and the ordering of the bread and wine before the Prayer of Consecration is not illegal. It being admitted that two candles, not required for the purpose of giving light, were alight throughout the celebration on the holy table without objection on the part of the respondent, who was officiating as bishop, but there being no evidence either of a ceremonial use of the lights, or that the respondent had introduced them as unlawful ornaments, *held* that the respondent was not responsible therefor, and that his making no objection thereto was not an ecclesiastical offence:—*Held*, that where promoters have established the commission of an ecclesiastical offence, they are not entitled as of right to a monition; but that the archbishop was entitled, on being satisfied that the offence would not be repeated, to accept the assurance of future submission. READ *v.* BISHOP OF LINCOLN - - - - - - 644

EVIDENCE—Historical facts—Admissibility
See ECCLESIASTICAL LAW. 2. [644

FAILURE OF ISSUE—Scotch law—Antenuptial contract - - - - 583
See SCOTCH LAW. 5.

FRAUD—Pleading—Raising new issue - 473
See PRIVY COUNCIL PRACTICE. 2.

FRAUDULENT PREFERENCE—Knowledge of debtor's insolvency - - - 287
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 3.

GARNISHEE ORDER - - 90, 118
See PRACTICE—SUPREME COURT. 1, 2.

HABEAS CORPUS—*Appeal from Order for issue of Writ of Habeas Corpus—Issue of Writ against Person who has no longer Custody of Person detained—Illegal handing over of Person detained—Impossibility of obeying Writ — Jurisdiction of Court of Appeal—"Judgment or Order"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66).] On an application by the parent for a writ of habeas corpus in respect of a child, directed to the head of an institution for destitute children in which the child had been placed, it appeared that before the proceedings began he had without authority from the parent handed over the child to another person to be taken to Canada, and he alleged that he did not know the address of such person or where he or the child was. The Court of Appeal affirmed an order absolute of the Queen's Bench Division that the writ should issue:—*Held*, that such an order is an order within the meaning of sect. 19 of the Judicature Act 1873, and that an appeal lies from it to the Court of Appeal:—*Held* also, affirming the decision of the Court of Appeal (24 Q. B. D. 283) but without expressing any opinion as to the circumstances under which the child was sent to Canada, that the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ, in order that the facts might be more fully investigated. — The law as laid down in *Reg.* v. *Barnardo, Tye's Case* (23 Q. B. D. 305) disapproved by Lord Halsbury L.C. and by Lords Watson, Herschell and Hannen. BARNARDO *v.* FORD. GOSSAGE'S CASE - - 326

HABEAS CORPUS—*continued.*

HARBOUR MASTER—Authority of - 264
See SHIP.

HIGHWAY—Repair of—Urban authority 345
See LOCAL GOVERNMENT.

HUSBAND AND WIFE—Custody of children 425
See PRIVY COUNCIL APPEALS—CANADA. 4.

—— Death of husband from injury—Right of action of widow - - - 481
See PRIVY COUNCIL APPEALS—CANADA. 5.

—— Scotch law—Marriage contract - 583
See SCOTCH LAW. 5.

IMPLICATION — Gift over without leaving children - - - - 342
See WILL.

INCOME TAX - - - 150, 309
See REVENUE. 1, 2.

INQUIRY—As to damages - - - 166
See DAMAGES.

INSOLVENCY—Payment of debt with knowledge of - - - - - 287
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 3.

INSURANCE, LIFE—Mortgage of policy—Right to policy money - - - 1
See MORTGAGE. 1.

INVESTMENT—Trust funds - - 112
See TRUSTEE.

JUDGE—Power to appoint—New South Wales [287
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 3.

JUDGMENT—Charge on land—Money secured by bond - - - - 547
See BOND.

LIEN—Shares of company - - - 281
See PRIVY COUNCIL APPEALS—NATAL.

LIFE INSURANCE SOCIETY — Income tax — Annuities payable out of profits - 309
See REVENUE. 1.

LOCAL GOVERNMENT—*Highway—Urban Authority—Surveyor of Highway—Liability to Action for Non-repair of Highway — Statutory Duty, Breach of—Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 149.] A highway was by virtue

LOCAL GOVERNMENT—*continued.*
of the Public Health Act 1875 vested in and under the control of a local board as the urban authority for the district. Sects. 144 and 149 of that Act provide that the urban authority shall have and be subject to all the powers duties and liabilities of surveyors of highways, and shall from time to time level alter and repair the highways vested in them as occasion may require. An owner of land adjoining the highway in making an approach to his land without the sanction or authority of the local board made a drop in the level of the highway and left it in a dangerous condition. The appellant walking along the highway fell down the drop and was injured. In an action by him against the local board for suffering the highway to be out of repair and in a dangerous condition it appeared that the local board was chargeable only with nonfeasance and not misfeasance:—*Held* affirming the decision of the Court of Appeal, that no action lay against the local board.—*Gibson* v. *Mayor of Preston* (Law Rep. 5 Q. B. 218) approved. COWLEY *v.* NEWMARKET LOCAL BOARD [345

MANITOBA, LAW OF - - - 445
See PRIVY COUNCIL APPEALS—CANADA. 1.

MANSION HOUSE—Sale of - - - 356
See SETTLED LAND ACTS.

MASTER AND SERVANT—Scotch law—Injury to workman—Negligence - 576
See SCOTCH LAW. 2.

MIXED CHALICE—Church ceremonies - 644
See ECCLESIASTICAL LAW. 2.

MORTGAGE—*Policy of Insurance—Construction of Contract—Right to Policy Money—Fetter on Redemption.*] Trustees of an insurance society advanced £10,000 to C. on the security of a reversionary interest to which C. was entitled contingently on his surviving his father. As part of the loan transaction the trustees insured the life of C. against that of his father for £34,500 in the society of which they were trustees, and paid the premiums till C.'s death. C. executed a bond charging the reversion with principal, premiums, and interest on principal and premiums. By written agreements the interest and premiums were to accumulate at compound interest for five years. The agreements contained special clauses providing (inter alia) to whom the policy in certain specified events should belong, and declared that in the event of C. paying the whole sum due before the death of his father the trustees should be bound to assign the policy to C., and that if C. should predecease his father without having paid all principal moneys, interest, and costs the policy should belong absolutely to the trustees, they being bound in that event to impute to the debt all moneys they might receive in respect of the policy. C. died in his father's lifetime, having never paid anything:—*Held*, Lord Hannen dissenting, that upon the true construction of the documents the contract was, not that the policy should be effected for the trustees' protection only and for their sole benefit, subject to an option for C. to make it his own in

MORTGAGE—*continued.*
the event of his paying off the debt in his lifetime, but that the policy was mortgaged to the trustees and was the property of C. subject to the charge; therefore that in accordance with the equitable doctrine against fettering a mortgagor's right of redemption C.'s representatives were entitled to the policy moneys after deducting all sums due:—*Held*, by Lord Hannen, that upon the true construction of the documents the transaction was not intended to be and was not a mortgage of the policy; that the policy never belonged to C., but in the event which happened belonged absolutely to the trustees, subject to the obligation to impute to the debt the moneys received.—The decision of the Court of Appeal (45 Ch. D. 190) affirmed. SALT *v.* MARQUESS OF NORTHAMPTON - - - - 1

2. —— *Priorities—Equitable Mortgagees—Fraud of Mortgagor—Title Deeds—Legal Estate—Negligence.*] Land was devised to the S. trustees in strict settlement, the trustees, who were devisees to uses, having powers of sale and mortgage and as incidental thereto power to revoke the uses declared by the will. The trustees made a legal mortgage of the land with other property and afterwards sold the land to T. without notice of the mortgage (which appeared to have been forgotten) and handed the title deeds to him. T. shewing a forged title mortgaged the land to the plaintiffs (who believed they thereby acquired a good legal mortgage) and handed the forged title deeds to them. T. then made another mortgage shewing the true title to the defendant (who also thought he had a legal mortgage) and handed the genuine title deeds to him. Neither the plaintiffs nor the defendant had at the date of their respective mortgages any notice of the prior legal mortgage, and the defendant had no notice of the plaintiffs' mortgage. Afterwards the defendant discovered the existence of the plaintiffs' mortgage and of the prior legal mortgage, and thereupon induced the legal mortgagees to release the land from their mortgage (the remaining property being sufficient for their security) and to reconvey the legal estate by a voluntary deed to the S. trustees on the express condition that the latter should immediately thereafter convey the legal estate to the defendant. This the S. trustees accordingly did, having at the time notice of the plaintiffs' mortgage. The plaintiffs having brought an action as first equitable mortgagees to establish their priority over the second equitable mortgagee:—*Held*, affirming the decision of the Court of Appeal ([1891] 1 Ch. 8), that there was nothing to shew that the second equitable mortgagee had acted inequitably in getting in the legal estate; that there was no equity which prevented him from availing himself of its protection; and that he was entitled to priority over the first equitable mortgagee.—Observations by Lord Macnaghten upon the question of negligence and the judgment of Kay, J. TAYLOR *v.* RUSSELL - - 244

MUNICIPAL CORPORATION—*Capacity to Contract—Ultrà Vires—Borough Rates, Misapplication of—Improvement Rate—Surplus of Borough Fund—Agreement to make Annual Payments for use of Bridge in Borough for Foot-passengers,*

MUNICIPAL CORPORATION—*continued.*

how far valid—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50), *ss.* 140, 143, 144.] A municipal corporation, which was subject to the Municipal Corporations Act 1882 and a Local Improvement Act, agreed with a railway company to pay the company a certain annual sum for fifteen years in consideration that the company would throw open the roadway of a bridge belonging to them within the borough for the use of foot-passengers free from toll. The local Act authorized rates for certain purposes not including such a bridge as the agreement referred to, and provided that the money accruing from the general rate should be applied to certain specified purposes "and subject thereto for the improvement or benefit of the borough in such manner as the corporation from time to time think fit in as full and ample a manner as any borough rate authorized by the Municipal Corporations Acts is made applicable." An action having been brought by the Attorney-General at the instance of relators against the corporation, claiming an injunction to restrain the corporation from making the said payments out of moneys derived from the rates and a declaration that the agreement was ultrà vires and void:—*Held*, affirming the decision of the Court of Appeal (23 Q. B. D. 492), that there must be a declaration that the corporation were not entitled to pay any moneys (which might become payable under the agreement) out of the borough fund, nor to make any borough rate nor any general or improvement rate under the Municipal Corporations Act 1882 or the local Act for the purpose of such payments; but that the agreement was not ultrà vires or void, and that the foregoing declaration was not to prevent the corporation from paying such moneys out of any surplus which there might be of the borough fund or of the aforesaid rates after applying the same respectively to the purposes for which they might respectively be made under the provisions of those Acts, with liberty to the plaintiff to apply for an injunction if necessary. MAYOR, &c., OF NEWCASTLE-UPON-TYNE *v.* ATTORNEY-GENERAL. ATTORNEY-GENERAL *v.* MAYOR, &c., OF NEWCASTLE-UPON-TYNE [568

NEGLIGENCE—Damage to ship—Authority of harbour master - - - 264
See SHIP.

—— Injury to workman—Scotch law - 576
See SCOTCH LAW. 2.

—— Pleading—Raising new issue—Appeal 473
See PRIVY COUNCIL PRACTICE. 2.

—— Priority of mortgages - - - 244
See MORTGAGE. 2.

NEGOTIABLE SECURITY—Bonds payable to bearer - - - - 201
See BANKER.

NEWFOUNDLAND — Fishery — Treaty with France—Private Rights - - 491
See CROWN.

NEW ZEALAND, LAW OF - - - 387
See PRIVY COUNCIL APPEALS — NEW ZEALAND.

ORDER IN COUNCIL, 1869—Consular Court—Madagascar - - - - 61
See PRIVY COUNCIL APPEALS—MADAGASCAR.

ORDER IN COUNCIL, August, 1877—High Commissioner—Pacific Islands - 75
See PRIVY COUNCIL APPEALS—PACIFIC ISLANDS.

OVERDRAFT — Unauthorized — Liability of Banker - - - - 292
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 1.

PATENT—Prior publication—Scotch law 263, 367
See SCOTCH LAW. 3, 4.

PENALTY — Bond — Principal and interest exceeding penalty - - - 547
See BOND.

PLEDGE—Document containing terms of 231
See BILL OF SALE. 1.

—— Negotiable securities - - - 201
See BANKER.

POLICY OF INSURANCE—Mortgage—Right to policy money - - - 1
See MORTGAGE. 1.

POSSESSION—Licence to take - - 231
See BILL OF SALE. 1.

PRACTICE—HOUSE OF LORDS—*Costs—Pauper—Taxation—Costs of successful Pauper Appellant in House of Lords.*] On the taxation of a pauper appellant's costs on a successful appeal in this House the fees of this House and the fees of counsel are to be disallowed, and the solicitor is to have his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, &c. JOHNSON (PAUPER) *v.* LINDSAY & CO. [110

2. —— *Time for Appealing—Appellate Jurisdiction Act* 1876: *Standing Order I.*] By No. I. of the Standing Orders of the House of Lords, applicable to all appeals presented on or after the 1st of November 1876, it is ordered that "except where otherwise provided by statute no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment or interlocutor appealed from."—Under this Standing Order when an appeal lies from an order of the Court of Appeal made within the year, this House can in some cases entertain an appeal from a previous order of the Court of Appeal made more than a year before; no definite rule can be laid down; each case must be judged by its own circumstances. — By LORD MACNAGHTEN:—When there is a competent appeal from an order made within the year, there is nothing in the Standing Orders or in the practice of the House in regard to appeals to prevent the House from entertaining an appeal from a previous order which is so connected with the later order as properly to form the subject of one and the same appeal, if the previous order is in an appealable condition, if it does not belong to a stage in the proceedings which has been definitely passed, or to a chapter in the litigation which

PRACTICE—HOUSE OF LORDS—*continued.*
may fairly be regarded as closed, and if it is clear that the appeal will not lead to additional inquiries and further expense.—The decision of the Court of Appeal (40 Ch. D. 543) varied, a different view being taken of the facts. CONCHA *v.* CONCHA [670

PRACTICE—PRIVY COUNCIL - 422, 473
See PRIVY COUNCIL PRACTICE. 1, 2.

PRACTICE — SUPREME COURT — *Garnishee Order—Attachment of Debts—Affidavit in support of Application—Information and Belief of Deponent—Allegation of particular Debt being Due—Inquiry as to other Debts—Order XLV., r.* 1.] In an affidavit in support of an application for a garnishee order under Order XLV., r. 1, of the Rules of the Supreme Court, the deponent need not swear positively to the existence of a debt due from the garnishee to the judgment debtor; it is sufficient if he states his information and belief as to the existence of a debt.—In an affidavit in support of an application for a garnishee order the deponent stated his information and belief that a specific debt was due from the garnishee to the judgment debtor. The garnishee in his affidavit denied that he owed that debt, but he declined to deny that he owed any debt:—*Held*, that an order for payment was rightly made upon the garnishee.—The decision of the Court of Appeal ([1891] 1 Q. B. 216) affirmed. VINALL *v.* DE PASS - - - - 90

2. —— *Garnishee Order — Attachment of Part of Debt—Balance in Hands of Garnishee—Order XLV., rr.* 1, 2.] A garnishee order nisi which attached all debts owing or accruing due from the garnishee to the judgment debtor was served on the garnishee who had in his hands as banker moneys belonging to the judgment debtor exceeding the amount of the judgment debt. The judgment debtor having brought an action against the garnishee for refusing to honour cheques which the judgment debtor drew on the balance over and above the amount of the debt:—*Held*, affirming the decision of the Court of Appeal (23 Q. B. D. 236), that an order made in these terms attached the whole of the moneys, that the garnishee was right in dishonouring the cheques, and that no action lay.—*Semble*, that the operation of such an order may be restricted by the Court or a judge to such an amount of the debts owing by the garnishee as will satisfy the judgment debt. ROGERS *v.* WHITELEY 118

PREROGATIVE OF CROWN—Interference with private rights - - - 491
See CROWN.

—— Province of British North America - 437
See PRIVY COUNCIL APPEALS—CANADA. 2.

PRESCRIPTION — Law of Canada — Widow's right of action - - - 481
See PRIVY COUNCIL APPEALS—CANADA. 5.

PRESENTATION—Advowson—Roman Catholic patron - - - - 417
See ECCLESIASTICAL LAW. 1.

PRIMOGENITURE—Law of Malta - 69
See PRIVY COUNCIL APPEALS—MALTA.

PRIOR PUBLICATION—Patent - 263, 367
See SCOTCH LAW. 3, 4.

PRIVY COUNCIL—Authority of decisions 644
See ECCLESIASTICAL LAW. 2.

PRIVY COUNCIL APPEALS—CANADA—*Manitoba—Dominion Statute, 33 Vict. c. 3—Manitoba Public Schools Act*, 1890—*Denominational Schools—Powers of Provincial Legislature.*] According to the true construction of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute), having regard to the state of things which existed in Manitoba at the date thereof, the legislature of that province did not exceed its powers in passing the Public Schools Act, 1890.—Sect. 22 of the Act of 1870 authorizes the provincial legislature exclusively to make laws in relation to education so as not to "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice in the province, at the Union":—*Held*, that the Act of 1890, which abolished the denominational system of public education established by law since the Union, but which did not compel the attendance of any child at a public school, or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain, and conduct its own schools, did not contravene the above proviso; and that accordingly certain by-laws of a municipal corporation which authorized assessments under the Act were valid. CITY OF WINNIPEG *v.* BARRETT. CITY OF WINNIPEG *v.* LOGAN - - - - - - 445

2. —— *New Brunswick — British North America Act*, 1867—*Relations between Crown and Provinces — Winding-up of Bank — Priority of Provincial Government over other Simple Contract Creditors—Prerogative of the Crown.*] The British North America Act, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sects. 109 and 126 are vested in Her Majesty as sovereign head of each province.—*Held*, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches. LIQUIDATORS OF THE MARITIME BANK OF CANADA *v.* RECEIVER-GENERAL OF NEW BRUNSWICK - - 437

3. —— *Nova Scotia—Revised Statutes of Nova Scotia (5th Series), c. 7, s. 19—Appointment of Arbitrator in default of the Proprietor—Notice not necessary.*] Where the warden of the municipality had under Revised Statutes of Nova Scotia (5th Series), c. 7, s. 19, appointed an arbitrator on behalf of the respondent to estimate

PRIVY COUNCIL APPEALS—CANADA—*contd.*
damages to be paid to him by the appellants under the statute, and it appeared that the respondent had received and neglected a notice under sect. 18 to appoint:—*Held*, that such appointment was not a judicial act, and that a fresh notice to the respondent in relation thereto was not a condition precedent to its validity.—Where an award gave to a landowner a fixed sum as estimated damages for all works or occupation necessary to or required by the mining lessee, *held*, that having regard to the subject-matter and scope of the Act, such award was not bad for uncertainty. PALGRAVE GOLD MINING COMPANY *v.* MCMILLAN - - - 460

4. —— *Ontario—Husband and Wife—Custody of Children—Paternal Authority controlled by External Considerations.*] On the application of a husband against his wife for a writ of habeas corpus in respect of their three children, two of them being above twelve years of age, and therefore not within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children apart from him; that after the second separation he publicly and falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income:—*Held*, that the Courts below exercised a right discretion in discharging the writ and remanding the children to the custody of their mother.—The father's legal power was controlled, as to the youngest child, by a statute which gave absolute authority to the Court; it was materially affected as regards the other two by breach of marital duty, by consideration with respect to their welfare, and the objection to separating them from each other. SMART *v.* SMART 425

5. —— *Quebec—Interpretation of Code—Civil Code, ss.* 1056, 2262 (2)—*Prescription—Widow's Right of Action distinct from that of Deceased.*] An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory Code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein.—*Held*, that the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by sect. 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under sect. 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased. ROBINSON *v.* CANADIAN PACIFIC RAILWAY COMPANY - - - - 481

PRIVY COUNCIL APPEALS—JERSEY—*Crown Fiefs—Liability of Prévôt—Rents—Practice as to Documents not before the Court below.*] *Held*, that the Crown is entitled to demand of the Queen's Prévôt in the parish of St. John personally the payment of the rents due in respect of its fief in the said parish, whether or not he has received the contribution thereto of his co-tenants:—*Held*, further, that there is no obligation on the Crown to furnish the Prévôt with a list of the persons liable to contribute in respect of the said rent.—It was ordered in this case that certain documents not before the Court below should be received by the Registrar and produced at the hearing, subject to objection as to admissibility. ATTORNEY-GENERAL AND RECEIVER-GENERAL FOR JERSEY *v.* LE MOIGNAN - 402

PRIVY COUNCIL APPEALS—MADAGASCAR—*Power of Judge of the Consular Court—Order in Council of* 1869—*Action for Damages against Judge.*] Under an Order in Council, dated 4th of February, 1869, the Consular Court of Madagascar was vested with plenary civil jurisdiction over all British subjects within its limits, though it was not created in the sense of English law a Court of Record:—*Held*, that the appellant, whilst sitting and acting as a judge of the Consular Court, was entitled to the same degree of protection which is accorded by the law of England to the judge of a Court of Record; and that an action for damages did not lie against him for dismissing without proof an action which he held to be vexatious; for however inadequate his reasons for such holding might be, such dismissal was within his jurisdiction.—*Lawrance* v. *Norreys* (15 App. Cas. 210) approved. HAGGARD *v.* PÉLICIER FRÈRES - - - - 61

PRIVY COUNCIL APPEALS—MALTA—*Construction—Primogenitura—Presumption that prescribed Order of Succession is "regular."*] *Held*, with regard to a primogenitura, created in 1702, of certain lands in Malta, that the presumption of Maltese law was in favour of its being "regular," so as in each line of descent to admit female in default of male issue of the last holder in that line, in preference to male collaterals descended from a common ancestor; and that the natural construction of the deed was to the same effect.—*D'Amico* v. *Trigona* (13 App. Cas. 806) followed. SCEBERRAS TRIGONA *v.* SCEBERRAS D'AMICO 69

PRIVY COUNCIL APPEALS—NATAL—*Lien by Company on Member's Shares—Articles of Association—Lien Lost or Waived.*] A lien conferred upon a company by its articles of association on all shares registered in the name of a member for his debts to the company, such member's title to transfer the same, while he remains indebted, being thereby made dependent on the approval of the directors, is valid.—*Bradford Banking Company* v. *Briggs & Co.* (12 App. Cas. 29) approved.—Such lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention or which shew an intention to waive it.—Where an indebted shareholder applied to the company for time, and the indulgence was granted in consideration of his authorizing certain shares, other than those on which a lien is claimed, in this suit, to be sold on default without the delay prescribed by the articles:—*Held*, that no limitation of the lien on the shares in suit was contemplated by either party, and that

PRIVY COUNCIL APPEALS—NATAL—*contd.*
a transfer by the indebted shareholder of such shares should not be registered. BANK OF AFRICA *v.* SALISBURY GOLD MINING COMPANY - 281

PRIVY COUNCIL APPEALS — NEW SOUTH WALES — *Banker and Customer — Fraudulent Detention of Money by Customer's Cashier—Unauthorized Overdraft—Liability of Bank.*] Where in pursuance of an arrangement between the appellant bank and the local government the Registrar-General opened an account which, to the knowledge of the appellant, was simply for the purpose of the daily lodgment of the collections of his department and the weekly transferring by his cheque of such lodgments to the treasury; and the cashier sent to lodge such moneys continuously kept back a part thereof, concealing his fraud by means of forged receipts by a fictitious clerk of the bank, whereby the weekly cheques of the Registrar-General in favour of the treasury resulted in overdrafts to the extent of £6127, of which he was ignorant, and which the bank omitted to bring to his notice:—*Held*, in an action by the bank against the Government to recover the same, that the latter was not liable. The Government had only received the amount which had been actually collected and which the bank by honouring the weekly cheques represented that it had received in lodgment. The overdrafts by the Registrar-General were not merely without authority, but were outside the scope and object of the lodgments and of the drawing therefrom. LONDON CHARTERED BANK OF AUSTRALIA *v.* MCMILLAN 292

2. —— *Fraudulent Conveyance—Voluntary Charitable Gifts — Subsequent Conveyance for Value*—27 *Eliz. c.* 4.] *Held*, that a voluntary gift for charitable purposes is not to be treated as covinous within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value. RAMSAY *v.* GILCHRIST - - 412

3. —— *Fraudulent Preference*—25 *Vict. No.* 8 *—Payment of Debt—Creditor's Knowledge of his Debtor's Insolvency.*] Where a creditor receiving payment had knowledge of circumstances from which ordinary men of business would have concluded that his debtor was unable to meet his liabilities:—*Held*, in an action by the debtor's assignee in insolvency to recover such payment, that the same was invalid, the creditor having known at the date thereof, within the meaning of 25 Vict. No. 8, of his debtor's insolvency. NATIONAL BANK OF AUSTRALASIA *v.* MORRIS 287

PRIVY COUNCIL APPEALS—NEW ZEALAND —*Supreme Court Judges Act*, 1858, *s.* 2—*Statutory Limitation of Power to appoint Judges.*] The 2nd section of the Supreme Court Judges Act of 1858 provides that "the Supreme Court of New Zealand shall consist of one judge, to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint:—*Held*, that this section can only be construed consistently with other parts of the Act (see sect. 6 especially) as vesting in the Governor the appointment of judges to whom an ascertained salary is payable

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*
by law at the time of their appointment; and that the Act of 1882 did not affect this limitation of the Governor's power of appointment. BUCKLEY *v.* EDWARDS - - - - - 387

PRIVY COUNCIL APPEALS — PACIFIC ISLANDS — *Pacific Islanders Protection Acts*, 1872, 1875—*Order in Council, August* 13, 1877—*Jurisdiction of High Commissioner's Court—Suit relating to Land in Samoa—Measure of Damages for Trespass.*] By an Order in Council of the 13th of August, 1877, issued under the Pacific Islanders Protection Acts, 1872 to 1875, and the Foreign Jurisdiction Acts, 1843 to 1875, a High Commissioner's Court was established which by sect. 6 of the Order applied to "all British subjects for the time being within the Western Pacific Islands, whether resident there or not." By treaty between Her Majesty and the King of Samoa, dated the 28th of August, 1879, it was provided that civil suits in Samoa should be tried by the High Commissioner.—In a suit in that Court for the recovery of land in Samoa, and for damages for conversion of its produce, it appeared that the defendants did not dwell within the bounds of the said islands, but that they had a store in Samoa, affixed to which was a signboard with the name of their firm, where they carried on business by servants and agents:—*Held*, that by the true construction of the above Acts, Order, and treaty, the defendants were within the jurisdiction of the Court, and that the latter was competent to grant the relief prayed:—*Held*, further, that the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management. However wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiff. MCARTHUR & CO. *v.* CORNWALL - - 75

PRIVY COUNCIL PRACTICE—*Criminal Cases —Petition for Special Leave to Appeal.*] Her Majesty will not be advised to grant leave to appeal in criminal cases, where it is not even suggested or surmised that substantial and grave injustice has been done, either through a disregard of the forms of legal process, or by some violation of the principles of natural justice. *Ex parte* DEEMING - - - - 422

2. —— *Fraud—Failure of Proof—New Issue as to Negligence cannot be raised in Appeal.*] Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a company of which he was agent, to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed:—*Held*, that the appellants could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as is in law sufficient to infer his liability for the amount

PRIVY COUNCIL PRACTICE—*continued.*
paid by them under the insurance so transferred. Fraud was of the essence of the declaration, and the evidence of the respondent directed to that issue cannot be accepted as representing all that he would have brought forward to rebut a charge of negligence nor had the points connected with that issue been submitted to the Courts below. CONNECTICUT FIRE INSURANCE COMPANY *v.* KAVANAGH - - - - - - 473

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REVENUE—*Income Tax—Life Assurance—Annuities, Sale of—Profits or Gains, Assessment of—Deductions in respect of Annuities paid—Income Tax Act*—5 & 6 *Vict. c.* 35 *s.* 100 *Sched. D case* 1, *rule* 4; *s.* 102.] A life assurance society as part of its business sold or granted annuities in consideration of a lump sum or premium paid down in the case of an immediate annuity, and of a similar payment or of periodical premiums in the case of a deferred or contingent annuity. In making up the balance sheet shewing the amount of its profits and gains for the purpose of assessment to income tax, under Sched. D, the society deducted from its gross income the sum paid in discharge of its annuity contracts. Upon the assessment for the year 1885-6 (and before the coming into operation of the Customs and Inland Revenue Act 1888 s. 24 sub-s. 3):—*Held*, reversing the decisions of the Queen's Bench Division (24 Q. B. D. 500) and of the Court of Appeal (25 Q. B. D. 351), that the society was not liable to be assessed in respect of the amount paid by it for annuities.—*Alexandria Water Company* v. *Musgrave* (11 Q. B. D. 174) distinguished. GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES - 309

2. —— *Income Tax — Occupation of Bank Premises by Agent—Abatement—Acts* 5 & 6 *Vict. c.* 35, *ss.* 100, 146, *Schedule D, Case ii. rule* 2, *and Case* 6, *Schedule E, rule* 6; 16 & 17 *Vict. c.* 34, *s.* 2; *and Customs and Inland Revenue Act*, 1876 (39 & 40 *Vict. c.* 16), *s.* 8.] By the Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), s. 8, it is provided that any person assessed to income tax who proves that his "total income from all sources" is less than £400 shall be entitled to be relieved from the duty on £120 of such income.—The appellant claimed relief under the above section on the ground that his income was less than £400. It appeared that he was agent for a bank, and was bound as part of his duty to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours. He was not entitled to sublet the bank house or use it for other than

REVENUE—*continued.*
bank business, and, in the event of his ceasing to hold his office, he was under obligation to quit the premises forthwith:—*Held* (reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 428)), that in estimating the appellant's total income from all sources, the yearly value of his privilege of free residence in the bank premises could not be brought into account. TENNANT *v.* SMITH (SURVEYOR OF TAXES) [150

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SCOTCH LAW — *Bankruptcy—Vesting of Heritable Estate in Bankrupt's Trustee—Latent Trust in Bankrupt—Doctrine Tantum et tale—Bankruptcy (Scotland) Act*, 1856 (19 & 20 *Vict. c.* 79), *s.* 102.] Heritage was held by a bankrupt on an unqualified ex facie absolute disposition registered in his own name; but it appeared that he held it only as trustee for the right owners, to whom he had given an unrecorded acknowledgment of the trust:—*Held*, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 1166), that the heritage did not vest in, or pass to, the bankrupt's trustee for the benefit of general creditors of the bankrupt. HERITABLE REVERSIONARY COMPANY *v.* MILLAR 598

2. —— *Master and Servant—Negligence—Injury to Workman resulting in Death after Action brought—Competency of Second Action by Mother for Solatium for same Injury.*] A workman having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending he died, intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for solatium for her son's death, and asked that the second action should be remitted to the same jury who were to try the first action:—*Held*, affirming the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 1164), that the second action was incompetent. WOOD *v.* GRAY & SONS - - - - 576

3. —— *Patent—Infringement — Prior Publication—Prior Public User.*] The validity of a patent for making dynamo-electric machines was challenged on the ground of prior publication, founded upon a description in the specification in an earlier patent:—*Held* (affirming the decision of the Court of Session (17 Court Sess. Cas. 4th Series (Rettie), 1266), that the question whether the specification of the earlier patent was sufficient to disclose the invention to the public did

SCOTCH LAW—*continued.*

not turn upon the sufficiency or insufficiency of the specification for the guidance of a skilled workman, for the patent might be void for incompiete directions to a workman of ordinary skill, and yet sufficient to inform the public of the invention; but that the proper test was whether, the description in the specification was sufficient to convey to men of science and employers of labour, information which would enable them to understand the invention, and give a workman specific directions for the making of the machine; and that, applying such test, there had been prior publication. ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION *v.* KING, BROWN & CO. [367

4. —— *Patent — Prior Publication—Foreign Publication sold in this Country.*] PICKARD & CURRY *v.* PRESCOTT - - - - 263

5. —— *Succession — Marriage Contract — Vesting — Conditio si sine liberis decesserit— Discharge of Trustees.*] The rule si sine liberis decesserit applies to ante-nuptial marriage contracts.—By ante-nuptial contract of marriage, the wife conveyed a sum of £4000 to trustees, First, to pay the wife during the life of the spouses the interest for her alimentary use exclusive of the jus mariti; Secondly, in the event of the predecease of the wife leaving a child or children of the marriage, the trustees were to pay the income to the husband during his life for "his alimentary use only," his right to assign and claims of creditors being excluded; and on his death to pay the capital of the fund over to the said "child or children" after their attaining majority, &c. And if there were no children alive at the dissolution of the marriage by the wife's predecease, or though there should then exist a child or children, in the case of the death of all of them before the term of payment of their provisions, then the interest was still, as provided, to be paid to the surviving husband, but the capital was to be at the wife's disposal by will to be conveyed to the disponees on the husband's death, and, failing any will, then to the wife's nearest heirs and executors, but with power to the trustees to pay over the capital at any time after the death of the predeceasing wife and "failure of issue," on obtaining, inter alia, the consent of the surviving husband. Thirdly, in the event of the predecease of the husband, and a child or children being then in existence, the trustees were to pay the interest to the wife for her alimentary use only, and, after her death, the capital to the children on majority; but declaring always if such child or children should all die before the wife or should "die before majority and without leaving issue," the trustees were still to pay the interest for the wife's alimentary use only; and, in the event of the wife surviving the husband and "failure of issue," she was to have the same power as above of disposing by will of the capital. It was further provided that the provisions of the children should not become vested interests until after the death of the survivor of the spouses, and until the children attained majority.—The wife died, leaving by will all she possessed to her husband, by whom she was survived, and by one

SCOTCH LAW—*continued.*

child, a son, stated to have been born subsequently to the wife's will. The son had no children. The husband and son claimed from the trustees immediate payment of the capital, on the ground that it must inevitably belong to one or the other:—*Held*, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 319), that the husband and son were not entitled to immediate payment, the trustees being bound to keep alive the trust for the protection of the alimentary provision to the husband, and the right of possible children born to the son. HUGHES *v.* EDWARDES - - 583

6. —— *Superior and Vassal—Whether Composition or Relief payable by the Vassal on Entry —Entry by Trustees—Effect of Confirmation of prior Infeftments by Superior.*] An ancestor of the appellant acquired three several parcels of land, "D.," "W.," and "T.," by purchase, in all of which his authors were infeft and entered with the superior. He took base infeftment in one of these parcels, "W."; but with the exception of the appellant none of the series of heirs upon whom his succession devolved ex pede a feudal title, or were entered with the superior. In 1810, one of these heirs, the grandfather of the appellant, conveyed these three parcels to trustees for the purpose of paying the truster and his wife an annuity; the truster's debts; and in the event of the truster's death before the debts were paid, to carry out any deed of settlement he might leave. Power was given to the trustees to sell with the truster's consent. When the debts were paid, or if demanded in 1814, the trustees were to reconvey. The truster died in 1811. In 1815 the trustees were entered in the lands of "D." and "W." with the superior whose charter confirmed previous infeftments. In 1828 the trustees were entered in the other lands of "T." On each entry they paid a composition of a year's rent. In 1860 the surviving trustee, by order of the Court, reconveyed the lands to the appellant, the truster's grandson and heir-at-law who was infeft, and by virtue of the Conveyancing (Scotland) Act of 1874 was impliedly entered with the superior. The appellant was not heir to the surviving trustee. On the appellant's entry, the superior claimed the composition of a year's rent:—*Held*, affirming the decision of the Court of Session (18 Court. Sess. Cas. 4th Series (Rettie), 587), that the appellant was liable to the superior in a composition; because, (*a*) assuming the trust to be simply an incumbrance, he would not have been in a position to enter as heir; (*b*) that the appellant's implied entry in 1874 was not enfranchised by the entry of his grandfather's trustees; and (*c*) that the confirmation in 1815 had not the effect of making the appellant's ancestor an entered vassal; the confirmation having no operation other than to safeguard the investiture of the trustees.—*Stuart* v. *Jackson* (17 Court Sess. Cas. 4th Series (Rettie), 85); *Duke of Athole* v. *Stewart* (17 Court Sess. Cas. 4th Series (Rettie), 724); and *Duke of Athole* v. *Menzies* (17 Court Sess. Cas. 4th Series (Rettie), 733), assuming them to be correct, must be taken to be not applicable. JOHNSTONE *v.* DUKE OF BUCCLEUCH - - - - 256

SETTLED LAND ACTS — *Mansion House—Sale—Tenant for Life—Consent of Court—Remaindermen opposing Sale—Tenants on Estate—Discretion of Court to allow Sale—Settled Land Act* 1882 (45 & 46 *Vict. c.* 38, *ss.* 3, 15, 50, 51, 53—*Settled Land Act* 1890 (53 & 54 *Vict. c.* 69) *s.* 10 *sub-s.* 2.] In the Settled Land Acts 1882 and 1890 the paramount object of the Legislature was the well-being of settled land.—An estate, including an old family mansion-house, became vested under a settlement in a tenant for life, a young man who had mortgaged his life estate to a money-lender who had brought an action for foreclosure. The tenant for life, who was too poor to reside on the estate, had contracted under the Settled Land Acts to sell the whole for a good price to a wealthy purchaser, and petitioned under s. 10 of the Settled Land Act 1890 for the sanction of the Court to the sale of the mansion-house and demesne lands. The remaindermen opposed the petition, desiring that the mansion-house and demesne lands should remain in the family:—*Held*, affirming the decision of the Court of Appeal ([1892] 1 Ch. 506), that the Court in the exercise of its discretion under the Settled Land Acts must have regard to the well-being of the land and the interests of the persons from whose industrial occupation the rents and profits were derived, as well as to the interests of those entitled under the settlement; and that to refuse the sanction in such a case would be to defeat the object of the Legislature. BRUCE *v.* THE MARQUESS OF AILESBURY - - 356

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SHIP — *Reparation — Negligence of Harbour-Master—Alleged Contributory Negligence of those on Board.*] When a vessel is within the jurisdiction of the harbour-master by law empowered to give compulsory orders, and he is giving his orders as to the place of anchorage or otherwise, it is only in the last resort, when the danger of following such orders is fully obvious that those on board are at liberty to disregard the orders, even though they may be under the impression that the harbour-master is making a mistake.—The sailing ship *Janets and Ann* was coming into Kirkcudbright Dock when she ran on a bank at the west pier, which was covered with water, and was damaged. At the time of the accident the vessel was within the jurisdiction of the harbour-master, and was coming in under his orders. The master of the ship was at the helm in charge of the ship, and was assisted in the navigation by two local fishermen, who were aware of the bank; but the master was ignorant of it. The harbour-master stood on the west pier and ordered the ship to "come on," being unaware it was then an ebb tide, when to sail into the dock was a dangerous operation. The master in obeying the order ported the helm, and the ship gradually approached the shore. One of the fishermen hailed the harbour-master, "Be sure to tell us when to let go the anchor." The order again was "Come on;" and then, too late to avoid the grounding, the harbour-master perceived his mistake, and ordered the anchor to be let go. It was admitted by the harbour-master

SHIP—*continued.*
that his intention was to bring the ship into the dock by sailing without warping; and that he did not know the tide was ebbing until after the ship had grounded:—*Held*, reversing the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie), 294), that the harbour-master was alone to blame, and that there was no contributory negligence on the part of the master who was in charge of the ship; and the failure of the persons on board who knew of the danger to inform the master did not absolve the harbour-master from the consequence of his negligence. RENEY *v.* THE MAGISTRATES OF KIRKCUDBRIGHT - - - - - - 264

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WATERWORKS—*Reservoir—Exercise of Statutory Powers—Deviation, lateral—Construction of works unauthorized by Statute — Injunction.*] Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any Court remodel arrangements sanctioned, or relax conditions imposed, by Act of Parliament. Deviation, in its ordinary and natural sense and as used in Acts of Parliament, means shifting the work in its integrity from one site to another which may be deemed more suitable. It does not imply a right not only to alter the situation of the work but in doing so to dispense with a half or two-thirds of it. A local and personal Act empowered commissioners to take water from a river for the supply of a township on condition of their executing certain works and (inter alia) a reservoir to supply compensation water to mill-owners, and a conduit, the reservoir to be constructed by an embankment across the river. The Act and the relative plans and sections described the position of the reservoir, its contour and capacity, and the height of the embankment, and provided that in constructing the authorized works the commissioners might subject to the provisions of the Act deviate from the lines of the works to any extent not exceeding the limits of lateral deviation shewn on the deposited plans, and from the levels shewn on the deposited sections, in the case of the reservoir to any extent of lesser height which would enable the commissioners to give a sufficient supply of water for compensation purposes; but the commissioners should not in the exercise of the power of lateral deviation thereby given construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shewn on the plans with reference to the corresponding embankment or wall and six feet in addition. In constructing the reservoir the commissioners curtailed it by more than one-third of its length and nearly two-thirds of its capacity, and placed the embankment higher up the river than the point fixed by the Act and so that the capacity could not be enlarged in the event of the supply of compensation water proving insufficient. In constructing the conduit the commissioners disregarded in material points the directions of the Act as to the course and serviceableness of the conduit and constructed a conduit which they alleged was "a substantial equivalent" to the mill-owners. The mill-owners having brought an action against the commissioners:—*Held*, reversing the decision of the Irish Court of Appeal (27 L. R. Ir. 179), Lords Morris and Hannen dissenting, that though no actual damage was proved the mill-owners were entitled to a declara-

WATERWORKS—*continued.*
tion that the reservoir and conduit were not in accordance with the provisions of the Act, and to an injunction restraining the commissioners from taking or using the waters of the river or from interfering with the flow of the river otherwise than as authorized by the Act. HERRON *v.* RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS - - - - - 498

WILL — *Construction — Gift of Income — Life Estate — Gift over — Death "without leaving Children"—Implied Gift to Children—Residuary Gift.*] A testator gave three freehold houses to his nephews S. and W. upon trust to pay the rents and interests to his niece during her life

WILL—*continued.*
for her separate use, and after her decease "(she leaving no children)" he gave one of the houses to S. and the two others to W. After making other bequests the testator gave the residue of his real and personal estate to S. and W. equally. The niece died leaving children:—*Held*, affirming the decision of the Court of Appeal (45 Ch. D. 299), that the niece took a life interest only, and that on her death the houses passed under the ultimate residuary gift to S. and W. equally, there being no implied gift to her children. SCALÉ *v.* RAWLINS - - - - 342

WITNESS—Address of—Bill of sale - 100
See BILL OF SALE. 2.

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